Guideline Sentencing Update

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Determining the Sentence

"Safety Valve" Provision

Fifth Circuit holds that statements to a probation officer do not satisfy requirement to provide information "to the Government." Defendant faced a ten-year mandatory minimum sentence after pleading guilty to a drug conspiracy charge. He requested application of 18 U.S.C. §3553(f), which allows sentencing under the Guidelines without regard to the mandatory minimum. USSG §5C1.2 incorporates §3553(f) into a guideline, and subsection (5) requires the defendant to have "truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." The probation officer interviewed defendant in preparation of the presentence report, but neither defendant nor the probation officer spoke to the government's case agent. The court gave defendant an opportunity to do so, but defendant refused. The court declined to apply §5C1.2 and sentenced defendant to the mandatory minimum.

Defendant argued on appeal that his discussion with the probation officer satisfied the requirement to disclose to the Government all information he knew about the criminal offense because the probation officer is, for purposes of §5C1.2, "the Government." The appellate court disagreed and affirmed the sentence. "In the context of the sentencing hearing, [Fed. R. Crim. P.] 32(c) uses 'Government' in conjunction with 'attorney' or 'counsel.' By the use of *in pari materia,* the Government argues that we should construe 'Government' in §5C1.2 the same way. The Government's position is supported by §5C1.2's explicit cross reference to Rule 32. *See* §5C1.2 commentary n.8. We agree with the Government and the district court that the probation officer is, for purposes of §5C1.2, not the Government. The purpose of the safety valve provision was to allow less culpable defendants who fully assisted the Government to avoid the application of the statutory mandatory minimum sentences. . . . A defendant's statements to a probation officer do not assist the Government."

U.S. v. Rodriguez, 60 F.3d 193, 195–96 (5th Cir. 1995).

First Circuit holds that defendant must make "affirmative act of cooperation" in providing "information and evidence" to government under §3553(f)(5). The "safety valve" provision in 18 U.S.C. §3553(f) requires, inter alia, that "(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." Although defendant did not directly speak with the government, he argued that he effectively provided the required information because his discussion of the crime with his coconspirators had been recorded by an undercover agent and, when pleading guilty, he admitted to the facts presented by the government at the plea hearing. The district court refused to apply §3553(f).

The appellate court affirmed. "Whatever the scope of the 'information and evidence' that a defendant must provide to take advantage of section 3553(f)(5), we hold that a defendant has not 'provided' to the government such information and evidence if the sole manner in which the claimed disclosure occurred was through conversations conducted in furtherance of the defendant's criminal conduct which happened to be tape-recorded by the government as part of its investigation. . . . Nor does it suffice for the defendant to accede to the government's allegations during colloquy with the court at the plea hearing. Section 3553(f)(5) contemplates an affirmative act of cooperation with the government no later than the time of the sentencing hearing. Here, Wrenn did not cooperate . . . . And when the court offered to postpone sentencing so Wrenn could make a proffer to the government for purposes of section 3553(f)(5), he refused."

U.S. v. Wrenn, No. 94-2089 (1st Cir. Sept. 25, 1995) (Lynch, J.).

See *Outline* generally at V.F.

Violation of Supervised Release

Sixth Circuit holds that amended statutory language does not require courts to follow revocation policy statements. The Violent Crime Control and Law Enforcement Act of 1994, effective Sept. 13, 1994, amended 18 U.S.C. §3553(a)(4) to state that courts "shall consider . . . (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission." Defendant argues that this amendment indicates that Congress intended that courts must now impose sentence following revocation of probation or supervised release in accordance with the Chapter 7 policy statements in the Guidelines. After his supervised release was revoked he was subject to a 3–

9-month term under §7B1.4(a), but the court thought that was too lenient and sentenced defendant to the two-year statutory maximum.

The appellate court affirmed, finding that the amendment did not change the current holding of all circuits that Chapter 7 policy statements must be considered but are not mandatory. Courts are required by 18 U.S.C. §3553(b) to follow *guidelines*, but "[a]bsent any applicable guidelines, the mandatory language of §3553(b) does not apply." Chapter 7 consists of policy statements only, without accompanying guidelines, that are intended to provide "greater flexibility to . . . the courts." *See* USSG Ch.7, Pt.A.3(a), intro. comment. "Therefore, because there are not any guidelines for the policy statements to interpret or explain, the mandatory language of §3553(b) does not apply. On a plain reading of amended §3553(a), a court is required to 'consider' the policy statements in Chapter 7 in imposing a sentence for supervised release violation. Defendant argues that in amending §3553 Congress only could have intended to make the policy statements mandatory. [There are] two other possible purposes: To make explicit that when the Commission does issue guidelines pertaining to the revocation of supervised release, those guidelines will be as binding as other sentencing guidelines; and to affirm the principle recognized by the Sixth Circuit that a court must consider the Chapter 7 policy statements when sentencing a defendant for violation of the conditions of supervised release. Defendant's conclusion about Congressional purpose does not follow from the wording of the amendment or reasoning of the cases. . . . Until the Sentencing Commission changes the policy statements in Chapter 7 to guidelines or Congress unequivocally legislates that the policy statements in Chapter 7 are binding, this Court will not reduce the flexibility of the district courts in sentencing supervised release violators."

U.S. v. West, 59 F.3d 32, 35–36 (6th Cir. 1995).

See *Outline* at VII.

Departures

Substantial Assistance

Ninth Circuit holds that government may not refuse §5K1.1 motion because defendant exercised right to trial. Defendant pled guilty to drug charges pursuant to a plea agreement in which he agreed to cooperate with the government. He faced a sentencing range of 235–293 months, but the government made a §5K1.1 motion and the district court sentenced him to 144 months. However, before sentencing, defendant had moved to withdraw his guilty plea and the court had denied the motion. After sentencing, the government agreed to allow defendant to withdraw his plea. The government tried to persuade defendant to forego a trial by offering to recommend a one-year sentence reduction if he pled guilty and, conversely, stating that if defendant went to trial it would "present additional charges to the Grand Jury and would not recommend [a §5K1.1] reduction." Defendant insisted on going to trial and was found guilty. He received a 188-month sentence after the government refused to make a §5K1.1 motion and the district court refused to depart. Defendant argued on appeal that the government's refusal to file was "in retaliation for his choice to exercise his constitutional right to a jury trial."

The appellate court agreed that "[t]he record supports this contention. . . . While it is undoubtedly true both that the government does not have to make a substantial assistance motion every time a defendant is cooperative and that the government may use the motion as a carrot to induce a defendant to make a plea, that is not what transpired in this case. Here, the government initially took the position at sentencing that the defendant had offered substantial assistance and made the appropriate motion, and then threatened to change its position to discourage the defendant from going to trial. . . . Mr. Khoury has presumptively established that the government has withdrawn its §5K1.1 motion because he forced them to go to the trouble of proving their case before a jury, as was his constitutional right. The government has pointed to no intervening circumstances that diminished the usefulness of what they previously considered to be substantial assistance. We therefore conclude that Mr. Khoury has made the 'substantial threshold showing' [of an unconstitutional motive] required by *Wade* [*v. U.S.*, 504 U.S. 181 (1992)]." On remand the district court should "exercise its discretion and consider the appropriate Guideline factors relating to a §5K1.1 motion."

U.S. v. Khoury, 62 F.3d 1138, 1140–42 (9th Cir. 1995) (Fernandez, J., dissenting). *Accord U.S. v. Paramo*, 998 F.2d 1212, 1219–21 (3d Cir. 1993) (may not deny §5K1.1 motion to penalize defendant for exercising right to trial).

See *Outline* at VI.F.1.b.iii.

Offense Conduct

Calculating Weight of Drugs

Fourth Circuit holds that amended LSD calculation applies to "liquid LSD." Defendant was convicted of LSD offenses that involved LSD dissolved on blotter paper and in a liquid solvent, and his sentence was based on the total weight of the mixtures. After the 1993 amendment to the LSD calculation (Amendment 488), he moved for resentencing. The district court applied the new method to the LSD on blotter paper but not to the liquid, reasoning that "in calculating the Guidelines involving liquid LSD, the 0.4 mg conversion factor should not be used because there is no carrier medium involved." The change in the weight of the blotter paper LSD was too small to lower the offense level, so defendant's sentence was not changed and he appealed, arguing that his offense level should be deter-

mined by calculating the number of doses in the liquid and then using the 0.4 mg per dose conversion factor of the amendment.

The appellate court remanded. Although Amendment 488 focuses on doses of LSD "on a blotter paper carrier medium" and did not provide a specific calculation for liquid LSD, there is a reference to it in §2D1.1, comment. (n.18): "In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted." The court determined "that the Commission intended 'liquid LSD' to refer to pure LSD dissolved or suspended in a liquid solvent, the form of LSD at issue in this case," and "did not intend 'liquid LSD' to refer to pure LSD because the Guidelines readily distinguish between drugs contained in an impure mixture or substance and drugs in 'pure' or 'actual' form." However, "[b]y defining pure LSD dissolved or suspended in a liquid solvent as 'LSD not placed onto a carrier medium,' Amendment 488 interprets the liquid solvent as not to be an LSD carrier medium for Guidelines purposes," leading the court to conclude that the 0.4 mg per dose calculation for paper carrier media is "inapplicable to liquid LSD." Instead, "Amendment 488 dictates that, in cases involving liquid LSD, the weight of the pure LSD alone should be used to calculate the defendant's base offense level . . . . [T]he plain language of the amendment supports this interpretation because Application Note 18 expressly authorizes the use of 'LSD alone' in cases involving liquid LSD," and the reference to upward departure "would be unnecessary had the Commission not intended courts to use the weight of the LSD alone in calculating a defendant's base offense level."

The court thus held that the offense level must be based on either the weight of pure LSD in the liquid or the number of doses contained in the liquid multiplied by 0.05 mg (the Drug Enforcement Administration's standard dosage unit for LSD referenced in §2D1.1's Background Commentary)—"we conclude that using the 0.05 mg factor is consistent with our conclusion above that the liquid solvent in liquid LSD is not a carrier medium for Guidelines purposes and with Amendment 488's primary approach that courts should use the weight of the LSD alone, and not the weight of the LSD and its liquid solvent or any potential carrier medium." "As in using the weight of the pure LSD, the court remains free to depart upward if it determines that using the 0.05 mg conversion factor does not reflect the seriousness of Turner's offense." Because the issue was not addressed below, the court added that it "need not decide whether [to] use the entire weight of the liquid LSD or some other weight in applying any statutory minimum sentence."

U.S. v. Turner, 59 F.3d 481, 484–91 (4th Cir. 1995).

See *Outline* at II.B.1.

Seventh Circuit holds that drugs purchased for personal use are included for sentencing on drug distribution conspiracy. Defendant pled guilty to conspiracy to possess with intent to distribute and to distribute cocaine. An admitted cocaine addict, he argued that approximately half of the cocaine he purchased from his supplier should not be included in calculating his offense level because it was for his personal use rather than for distribution. *See U.S. v. Kipp,* 10 F.3d 1463, 1465–66 (9th Cir. 1993) [6 *GSU* #9]. The district court disagreed and sentenced defendant on the full quantity of cocaine that he had purchased.

The appellate court affirmed, finding that its decision was controlled by *Precin v. U.S.,* 23 F.3d 1215, 1219 (7th Cir. 1994) (affirming inclusion of cocaine that defendant received for personal use as "commission" from sales for another conspirator—"Any cocaine which Precin received for his personal use was necessarily intertwined with the success of the distribution"). *Accord U.S. v. Brown,* 19 F.3d 1246, 1248 (8th Cir. 1994); *U.S. v. Innamorati,* 996 F.2d 456, 492 (2d Cir. 1993). The court concluded that all of the drugs were part of the "same common scheme or plan"—all the cocaine came from the same supplier, "was not divided into packages for distribution and packages for personal use, . . . [and] the amount that Snook personally consumed directly affected the conspiracy—the more Snook used, the more he had to sell to bankroll his habit." The court distinguished *Kipp* because that case did not involve a conspiracy—the offense of conviction there was possession with intent to distribute, and "the court decided that only the amount of drugs that the defendants intended to distribute was 'part of the same course of conduct or common scheme or plan.'"

U.S. v. Snook, 60 F.3d 394, 395–96 (7th Cir. 1995).

See *Outline* at II.A.1.

Loss

Seventh Circuit holds that interest due on a loan may be included in loss calculation. Defendant was convicted of offenses involving a series of fraudulent loans. In determining the amount of loss involved, the district court included the interest that defendant had agreed to pay on the loans. Defendant appealed, arguing that §2F1.1, comment. (n.7), states that loss "does not . . . include interest the victim could have earned on such funds had the offense not occurred."

The appellate court affirmed, agreeing with the circuits that have held that the exclusion of interest in Note 7 "refers to speculative 'opportunity cost' interest—the time value of money stolen from the victims. . . . It does not refer to a guaranteed, specific rate of return that a defendant contracts or promises to pay." The court added that "Note 7 states that loss is the value of the thing stolen—money, property, or services. In the context of a

loan agreement, the thing itself, or property, includes both the principal and the agreed-upon interest. But for the promise to pay interest, the bank would not have made the loan. The interest Allender challenges here could therefore properly be considered part of the property itself for purposes of Note 7. But even if it is properly deemed 'interest' under this Note, the language allows for a distinction to be made between the types of interest based on the level of certainty with which the interest was due. The Note uses the phrase 'interest the victim *could have* earned on such funds.' Inherent in this phrasing is a degree of speculation that is usually associated with mere investment opportunities—the time value of money. But where there is an enforceable agreement to pay a calculable sum, all speculation disappears. If this was the kind of interest contemplated by Note 7, the commentary drafters would likely have used different language, perhaps the phrase 'interest the victim *would have* earned.' They did not, and therefore we think that the only 'interest' properly excluded from the loss calculations here is the opportunity cost value of the item stolen."

The court noted that this decision conflicted with a recent decision by another panel in *U.S. v. Clemmons,* 48 F.3d 1020, 1025 (7th Cir. 1995), which held that under Note 7 interest promised to defrauded investors should not be included as loss. The current opinion was circulated among all active judges in the circuit and "[a] majority of the court has . . . agreed that *Clemmons* should be overruled to the extent that it conflicts with the holding in this opinion."

U.S. v. Allender, 62 F.3d 909, 917 (7th Cir. 1995).

See *Outline* at II.D.2.d.

Certiorari granted:

U.S. v. Koon, 34 F.3d 1416 (9th Cir. 1994), *cert. granted,* 64 U.S.L.W. 3199 (U.S. Sept. 27, 1995) (No. 94-1664). "Question presented: Is district court's downward departure from prescribed range of Sentencing Guidelines on basis of factors not expressly prohibited as grounds for departure to be reviewed under de novo standard applied by court below or under deferential standard set forth in *U.S. v. Rivera,* 994 F.2d 942 (1st Cir. 1993), and other cases?" Certiorari was also granted in a companion case, *Powell v. U.S.,* No. 94-8842 (U.S. Sept. 27, 1995), "to resolve sharp conflict among federal courts of appeals in essential approach to reviewing departures under federal Sentencing Guidelines, and in correct analysis of particular categories of downward departure involved in this case." *See also* 7 *GSU* #2; *Outline* at VI.C.3 and VI.C.4.b.

Opinion withdrawn:

U.S. v. Garza, 57 F.3d 950 (10th Cir. 1995), was withdrawn from publication Sept. 6, 1995, after a joint motion to dismiss the appeal was granted and the judgment vacated. Parts of the opinion were included in the upcoming September 1995 *Outline* (currently being printed with distribution expected after Oct. 23). The references to *Garza* in sections VI.C.5.c and VI.F.1.b.i should be deleted.

Correction:

The pending amendment to §2D1.1, which requires the use of number of pills rather than gross weight for certain controlled substances, will *not* be retroactive as is stated in the September 1995 *Outline*. Please delete that statement at the top of page 31 in section II.B.1.

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Departures

Mitigating Circumstances

Second Circuit affirms small downward departure for antitrust defendant because his imprisonment would have imposed "extraordinary hardship on the defendant's employees." Defendant was convicted of one count of price fixing and faced a guideline range of 8–14 months, which requires imprisonment for at least half the minimum term. *See* §5C1.1(d). The district court granted defendant's request for a departure of one offense level, which would allow defendant to avoid prison. The court concluded that imprisoning defendant "would extraordinarily impact on persons who are employed by him" and placed defendant on two years' probation, with the first six months in home confinement.

The appellate court affirmed, finding that the departure was legally appropriate and supported by the facts of the case. The court acknowledged that under §2R1.1, the guideline that applied to defendant, "antitrust offenders should generally be sentenced to prison" and that "the business effects of a white collar offender's incarceration generally provide no ground for departure." However, "a district court not only can, but must, consider the possibility of downward or upward departure 'when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest.' . . . Among the permissible justifications for downward departure, we have held, is the need, given appropriate circumstances, to reduce the destructive effects that incarceration of a defendant may have on innocent third parties," such as family members under §5H1.6. "The issue before us, then, is whether the facts considered by the district court comprise such 'extraordinary circumstances,' falling outside the heartland envisioned by the Antitrust Guideline. Our *de novo* review . . . makes clear that extraordinary effects on an antitrust offender's employees, 'to a degree[] not adequately taken into consideration by the Sentencing Commission,' warrant a downward departure."

The court then held that the district court properly found that defendant's "situation [was] extraordinary when it distinguished his case from other 'high level business people' it had sentenced." The record showed that defendant's remaining "companies' continuing livelihood depends entirely on [his daily] personal involvement, and that, in his absence, [their main creditor] might well withdraw its credit, leading to both companies' immediate bankruptcy and the loss of employment for [at least] 150 to 200 employees." It was not error to find that imprisoning defendant "would have extraordinary effects on his employees to a degree not adequately taken into consideration by the Sentencing Commission. While we agree with our sister circuits that business ownership alone, or even ownership of a vulnerable small business, does not make downward departure appropriate, . . . departure may be warranted where, as here, imprisonment would impose extraordinary hardship on employees. As we have noted in similar circumstances, the Sentencing Guidelines 'do not require a judge to leave compassion and common sense at the door to the courtroom.'"

U.S. v. Milikowsky, 65 F.3d 4, 6–9 (2d Cir. 1995).

See *Outline* at VI.C.1.e.

Extent of Departure

Seventh Circuit holds that defendant may appeal calculation of sentencing range even if new range would be above sentence defendant had received after downward departure. The district court determined that defendant's guideline range was 121–151 months. After the government recommended a 25% downward departure for substantial assistance, the court sentenced defendant to 91 months. Defendant appealed, arguing that he should have received a reduction in his offense level for being a minor participant, reducing his guideline range to 100–125 months, and that the 25% departure should have been made from the lower range.

As an initial matter, the appellate court faced "a jurisdictional question: whether a defendant may appeal the computation of his sentencing range, when he already has a sentence below the lower bound of the range he thinks is right." The court said yes, even though the extent of a discretionary departure is normally unreviewable: "Correction of a legal error often leads to a revision in the judgment, and the possibility that the district judge will impose the same sentence does not preclude review. . . . Unless the judge expressly states that he would impose the same sentence whichever range is correct, . . . the defendant has the *potential* for gain on a remand, because the district judge may have meant to grant a substantial discount from the properly calculated range. . . . The treatment of overlapping guideline ranges . . . offers a close parallel—with the difference that instead of two overlapping guideline ranges we have one range plus a zone of reasonable departures. If the district judge had said that he would impose a 91-month sentence whether

or not he thought Burnett a 'minor' participant, then there would be no point to this appeal. As things stand, however, the actual sentence may be a 'result' of the decision about minor-participant status. . . . It is in the interest of the legal system and defendants alike to ensure that even 'discounted' sentences rest on a legally correct foundation. We therefore conclude that [18 U.S.C.] §3742(a)(2) provides jurisdiction to entertain a claim that an error in the calculation of the guideline range influenced the sentence, whether or not that sentence ultimately falls below the properly calculated range."

However, the court ultimately affirmed the sentence after concluding that defendant's claim to minor participant status was not supported by the facts. Note that two other circuits have addressed this jurisdictional question and reached different conclusions. *Compare U.S. v. Hayes,* 49 F.3d 178, 182 (6th Cir. 1995) (because defendant alleged a "specific legal error," court would review 113-month sentence imposed after §5K1.1 departure even though it was below guideline range that would result if defendant's appeal of §3C1.2 enhancement succeeded; sentence remanded for further findings on whether §3C1.2 should be applied) *with U.S. v. Dutcher,* 8 F.3d 11, 12 (8th Cir. 1993) (affirmed: although defendant claimed that §3B1.1(a) enhancement was improper and his guideline range should have been 108–135 months rather than 168–210 months, court would not review 84-month sentence imposed after §5K1.1 departure—even if defendant's claim was correct, "his eighty-four month sentence would still represent a downward departure from the applicable guideline range [and] would still be non-reviewable").

U.S. v. Burnett, 66 F.3d 137, 138–40 (7th Cir. 1995).

See *Outline* at VI.D.

General Application

Amendments

Eighth and Ninth Circuits hold that 1991 amendment clarifying that career offender provision does not apply to felon-in-possession offense should be applied retroactively, but amendment to §2K2.1 that increased offense level for that offense cannot. Both defendants committed the offense of being a felon in possession of a firearm, and were sentenced as career offenders, before the Nov. 1991 amendment to §4B1.2's commentary (Amendment 433) "clarified" that the career offender guideline did not apply to that offense. After the amendment was made retroactive (Amendment 469) in Nov. 1992, both defendants sought resentencing. Application of Amendment 433 to the pre-1991 guidelines they were originally sentenced under would significantly lower their sentences, mainly by eliminating application of the career offender provision. Both district courts did apply Amendment 433, but instead of using the offense guideline in effect at the time of defendants' offenses or original sentencing they used a post-Nov. 1991 version of §2K2.1, which had been amended to increase the base offense level for the felon-in-possession offense but was not made retroactive. The courts reasoned that amended §2K2.1 could be used because it did not result in a harsher sentence than what defendants were originally subject to under the pre-Nov. 1991 guideline and then-existing circuit law. Defendants appealed and, following different reasoning, both appellate courts remanded.

The Ninth Circuit held that using the later version of §2K2.1 was an ex post facto violation because it "imposes a base offense level 15 levels higher than that imposed under the 1988 version—resulting in a harsher punishment under the later Guidelines. . . . The government has erroneously assumed that the proper comparison is between the 84-month sentence initially imposed on Hamilton under the 1988 Guidelines and the 77-month sentence imposed upon him at resentencing. This comparison is inappropriate, however, because it is based on the sentencing court's initial sentencing 'error.' . . . [W]hen the sentencing court initially sentenced Hamilton, it erred in calculating his sentence; instead of being sentenced to 84 months, Hamilton should have been sentenced only to 12 to 18 months. Therefore, we must compare the sentence that Hamilton received upon resentencing, 77 months, to the sentence that he should have received originally, 12 to 18 months." To properly resentence defendant, the court held, "the sentencing court is to apply the Guidelines in effect at the time of the offense, but must also consider the clarification provided by Amendment 433. As we conclude that application of the 1993 Guidelines indeed violates the Ex Post Facto prohibition, . . . the sentencing court [must] apply the Guidelines in effect at the time of the offense—the 1988 Guidelines—in light of Amendment 433."

The Eighth Circuit, rejecting the government's argument that Amendment 433 "is plainly inconsistent with both pre- and post-November 1991 law" and should not be applied retroactively, concluded that "the Commission's decision that the change is clarifying and suitable for retroactive use is not at odds with the Guidelines. . . . [T]he amendment raising the base offense level for felon-in-possession is best understood as a decision by the Commission that this crime was too leniently punished under the correct interpretation of its pre-November 1991 Guidelines. . . . Douglas seeks resentencing wholly under the Guidelines version employed by the original district court, but in light of a retroactive amendment clarifying that the court applied the wrong provision of that version. We conclude that Douglas is entitled to the relief that he seeks." Using the later version of §2K2.1, which was not designated for retroactive applica-

tion, would also be inconsistent with §1B1.10, comment. (n.2) (when applying a retroactive amendment, "the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.").

Hamilton v. U.S., 67 F.3d 761, 764–65 (9th Cir. 1995); *U.S. v. Douglas,* 64 F.3d 450, 451–53 (8th Cir. 1995). *But cf. U.S. v. Lykes,* 999 F.2d 1144, 1148–50 (7th Cir. 1993) (not an ex post facto violation to apply amended §2K2.1 and Amendment 433 to defendant sentenced in 1992 for 1990 offense; alternatively, if applying later guideline would violate ex post facto, Amendment 433 would not be applied to 1989 Guidelines because it was a substantive change that conflicted with circuit precedent).

See *Outline* at I.E and IV.B.1.b.

Sentencing Procedure

Waiver of Rights in Plea Agreement

Ninth Circuit upholds unconditional waiver of right to appeal sentence despite change in law between time of plea and sentencing. As part of the plea agreement defendant "waived 'the right to appeal any sentence imposed by the district judge.' The waiver was not conditioned on the imposition of any particular sentence or range." With a downward departure under §4A1.3 because his criminal history score overstated the seriousness of his prior offenses, defendant was sentenced to the 10-year mandatory minimum. After the plea agreement but before defendant was sentenced, Congress enacted 18 U.S.C. §3553(f), which allows drug offenders to be sentenced below applicable mandatory minimum terms if they meet certain requirements. The district court itself raised the issue of whether defendant might qualify, but ultimately ruled that he could not because he had three criminal history points and §3553(f) applies only if defendant "does not have more than 1 criminal history point, as determined under the sentencing guidelines." Defendant appealed, arguing (1) that the district court erred in ruling that he could not qualify for §3553(f) (presumably by departure to a lower criminal history score), and (2) that he should not be held to his waiver because he could not knowingly and intelligently waive the right to appeal the application of a law that did not exist at the time of his plea agreement.

The appellate court held that the waiver was valid and dismissed the appeal. "The temporal scope of an appeal waiver appears to be an issue of first impression in the federal courts. . . . We hold that Johnson's appeal waiver encompasses appeals arising out of the law applicable to his sentencing. On its face, Johnson's waiver does not appear to be limited to issues arising from the law as it stood at the time of his plea: the waiver refers to 'any sentence imposed by the district judge,' not 'any sentence imposed under the laws currently in effect.' Although the sentencing law changed in an unexpected way, the possibility of a change was not unforeseeable at the time of the agreement. Johnson was presumably aware that the law in effect at the time of sentencing, not the time of the plea, would control his sentence if the change in law did not increase his sentencing exposure. . . . Therefore, a waiver of an appeal of 'any sentence' is most reasonably interpreted as intending to waive appeals arising out of the district court's construction of the laws that actually determine Johnson's sentence, regardless of when they were enacted." The court also held that "the waiver could be knowing and voluntary as to laws enacted after the plea was entered into. . . . The fact that Johnson did not foresee the specific issue that he now seeks to appeal does not place that issue outside the scope of his waiver."

U.S. v. Johnson, 67 F.3d 200, 202–03 (9th Cir. 1995).

See *Outline* at IX.A.5.

Fed. R. Crim. P. 35(c)

Second Circuit holds that "imposition of sentence" for purposes of Rule 35(c)'s seven-day limit refers to the oral pronouncement of sentence. Four days after defendant was sentenced, and before written judgment of sentence was entered, the district court entered an order stating that there may be other factors relevant to the sentence that were not accounted for and that it was considering correcting the sentence under Fed. R. Crim. P. 35(c). However, because this could not be accomplished within the seven-day limit of the rule, the court reserved the right to correct the sentence if error was found. Almost six months later, at another sentencing hearing, the district court reconsidered the sentence and departed downward.

The appellate court reversed, holding first that the "correction" in this case—a downward departure—"is clearly outside the scope of the rule. By its terms Rule 35(c) permits corrections of 'arithmetical, technical, or other clear error[s].' . . . Since Abreu-Cabrera's resentencing represented nothing more than a district court's change of heart as to the appropriateness of the sentence, it was accordingly not a correction authorized by Rule 35(c)."

The court also had to answer "the question of whether 'imposition of sentence' refers to the oral pronouncement of a defendant's sentence or the docket entry of a written sentence (which was not done with respect to the oral pronouncement of Abreu-Cabrera's original sentence)," to determine whether Rule 35(c) actually applied here. Reasoning that the purpose of the rule is finality in sentencing, the court held that "a sentence is imposed for purposes of Rule 35(c) on the date of oral pronounce-

ment, rather than the date [the written] judgment is entered. . . . A contrary rule, interpreting the phrase to refer to the written judgment, would allow district courts to announce a sentence, delay the ministerial task of formal entry, have a change of heart, and alter the sentence—a sequence of events we believe to be beyond what the rule was meant to allow." *Accord U.S. v. Townsend,* 33 F.3d 1230, 1231 (10th Cir. 1994) ("sentence is imposed upon a criminal defendant, for purposes of Rule 35(c), when the court orally pronounces sentence from the bench"). *See also U.S. v. Fahm,* 13 F.3d 447, 453 (1st Cir. 1994) ("judgment and docket entry plainly reflect that the twenty-month prison sentence was 'imposed'" for purposes of Rule 35(c)). *But see U.S. v. Clay,* 37 F.3d 338, 340 (7th Cir. 1994) (stating that "date of 'imposition of the sentence' from which the seven days runs signifies the date judgment enters rather than the date sentence is orally pronounced"; when district court, after reconsidering original sentence and deciding not to change it, entered final judgment twelve days after oral pronouncement of sentence, "it acted within the time constraints of" Rule 35(c)).

U.S. v. Abreu-Cabrera, 64 F.3d 67, 72–74 (2d Cir. 1995).

See *Outline* at IX.F.

Certiorari granted:

U.S. v. Melendez, 55 F.3d 130 (3d Cir. 1995), *cert. granted,* 64 U.S.L.W. 3340 (U.S. Nov. 6, 1995) (No. 95-5661). "Question presented: Does district court have discretion to depart below applicable statutory minimum sentence when government has filed motion pursuant to Section 5K1.1 for downward departure from applicable range under federal Sentencing Guidelines but government has not filed motion under 18 U.S.C. §3553(e) for departure below statutory minimum?" See also the summary of *Melendez* in 7 *GSU* #10 and the *Outline* at section VI.F.3 (p.196).

Amended opinion:

U.S. v. Camp, 58 F.3d 491 (9th Cir. 1995) [7 *GSU* #11], has been superseded by an amended opinion issued Oct. 3, 1995. The holding remains largely the same but has been narrowed, with the court stressing that the grant of immunity must have been initiated by the state, thereby making the self-incriminating evidence state-induced. This distinguishes the holding from *U.S. v. Eliason,* 3 F.3d 1149, 1153–54 (7th Cir. 1993) and *U.S. v. Roberson,* 872 F.2d 597, 611–12 (5th Cir. 1989), which allowed such evidence to be used where the defendants had actively bargained with the state for the immunity. Please adjust the entries in the *Outline* for *Camp* at sections I.C (p.9) and VI.A.1.c (p.148) as necessary, and change the cite to 66 F.3d 185, 186–87.

Vacated opinion:

U.S. v. Shields, 49 F.3d 707 (11th Cir. 1995), *vacated upon granting of reh'g en banc,* 65 F.3d 900 (11th Cir. 1995). *Shields* was summarized in 7 *GSU* #9 and the *Outline* at section II.B.2 (p.33).

Guideline amendments:

Please delete the note in the *Outline* at section II.B.3 (p.35) regarding the proposed amendment to lower crack sentences. Congress has disapproved the amendments relating to the equalization of crack and powder cocaine sentences and to sentences for money laundering and transactions in property derived from unlawful activity. *See* P.L. 104-38 (Oct. 30, 1995). All other amendments noted in the *Outline* are effective as of Nov. 1, 1995.

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Departures

Mitigating Circumstances

Eleventh Circuit holds that departure may be warranted when use of the statutory maximum under §5G1.1(a) effectively negates the reduction for acceptance of responsibility. Defendant was convicted on two counts that each carried a statutory maximum sentence of four years. Because his guideline range was 135–168 months, he was sentenced to eight years pursuant to §§5G1.1(a) and 5G1.2(d). Defendant argued that the effect of using the statutory maximum as the final sentence was to deprive him of the benefit of the three-level reduction he had received for acceptance of responsibility, that his sentence would have been the same whether he accepted responsibility or not. The district court agreed, but held that it had no authority to depart and had to impose the eight-year sentence.

The appellate court remanded, concluding first that "a district court has the same discretion to depart downward when §5G1.1(a) renders the statutory maximum the guideline sentence as it has when the guideline sentence is calculated without reference to §5G1.1(a). Section 5G1.1(a) is simply the guidelines' recognition that a court lacks authority to impose a sentence exceeding the statutory maximum. Section 5G1.1(a) was not intended to transform the statutory maximum into a minimum sentence from which a court may not depart in appropriate circumstances." *Accord U.S. v. Cook,* 938 F.2d 149, 152–53 (9th Cir. 1991); *U.S. v. Sayers,* 919 F.2d 1321, 1324 (8th Cir. 1990); *U.S. v. Martin,* 893 F.2d 73, 76 (5th Cir. 1990).

The court then held that departure may be considered here. "We find no evidence in the sentencing guidelines, policy statements, or commentary of the Commission that it considered, or recognized the implications of, the interaction of §5G1.1(a) and §3E1.1 in cases such as this. . . . We think that the Commission failed to consider that §5G1.1(a) might operate to negate the §3E1.1 adjustment and undermine the 'legitimate societal interests' served by the adjustment." The court reasoned that "one of the 'legitimate societal interests' served by rewarding a defendant's acceptance of responsibility is providing an incentive to engage in plea bargaining. . . . If a defendant knows that, under §5G1.1(a), he will receive the same sentence regardless of whether he accepts responsibility, he will be more likely to shun plea bargaining and go to trial. . . . Allowing a departure based on acceptance of responsibility in such circumstances preserves the possibility of some sentencing leniency and thus serves society's legitimate interest in guilty pleas and plea bargaining. We hold, therefore, that a district court has the discretion to reward a defendant's acceptance of responsibility by departing downward when §5G1.1(a) renders §3E1.1 ineffectual in reducing the defendant's actual sentence."

U.S. v. Rodriguez, 64 F.3d 638, 642–43 (11th Cir. 1995) (per curiam).

See *Outline* generally at VI.C.5.a.

Second Circuit affirms, with modification, downward departure to allow defendant to enter special in-prison drug treatment program. Defendant pled guilty to two drug counts and faced a sentence of 130–162 months. At sentencing, however, the district court departed downward to the five-year mandatory minimum, partly because it felt defendant had committed the offenses largely to feed his drug addiction and because defendant had participated in a drug education program before sentencing, wanted to continue treatment in prison, and "had a genuine desire for rehabilitation." This sentence was overturned on appeal in *U.S. v. Williams,* 37 F.3d 82, 86 (2d Cir. 1994), with the court holding that defendant's efforts did not satisfy the test set forth in *U.S. v. Maier,* 975 F.2d 944, 946–49 (2d Cir. 1992) (rehabilitative efforts may be considered but must be "extraordinary" and admission to treatment program is not "an automatic ground for" departure).

By the time defendant was resentenced he had completed the drug education program and been accepted into an intensive, pilot treatment program at the federal prison in Butner, N.C. One requirement for admission to the program was that the inmate be 18–36 months away from a confirmed release date. The district court concluded that defendant's "admission to the selective drug treatment program based on objective factors and his subjective willingness to commit to the program regimen was a significant changed circumstance" that would allow departure. The court also "noted that 18 U.S.C. §3553(a)(2)(D) mandates a sentencing court to take account of the defendant's need for 'medical care[] or other correctional treatment in the most effective manner,'" and that without a departure the pilot program would not be available to defendant for several years, if at all. The court imposed the same five-year sentence, which included a 10-year term of supervised release so that "if even once he goes back to the drug life he led before . . . [defendant] will go back to prison for a period of time comparable to that required by the guidelines."

This time the appellate court affirmed the departure, although it remanded for stricter conditions of super-

vised release. "To say that admission to a drug treatment program is not 'an automatic ground for obtaining a downward departure' . . . is not to say that it can never be the basis for such a departure, provided that there exist other compelling circumstances not adequately considered by the Commission. . . . On remand, the district court did not depart from the guidelines sentencing range of 130 to 162 months simply because Williams had entered a drug treatment program. It departed because, on the facts of this case, there was effectively no other sentence that would accord with the requirements of 18 U.S.C. §3553(a)(2)(D). The district court determined that Williams was an excellent candidate for rehabilitation given his prior history, demeanor, post-arrest resolve, and acceptance into a 'special and selective' treatment program based on criteria devised by experts in the field."

"We believe that the district court had the authority to depart downward in order to facilitate Williams's rehabilitation given the atypical facts of this case, which place it outside the 'heartland' of usual cases involving defendants who may benefit from drug treatment. . . . We clarified in *Williams I* that 'demonstrated willingness' to rehabilitate one's self must be manifested by objective indicia of extraordinary efforts to that end. 37 F.3d at 86. But when a defendant who has been in federal custody since his arrest has had no opportunity to pursue any rehabilitation, when he has been admitted to a selective and intensive inmate drug treatment program, and when a sentence within the guideline range would effectively deprive him of his only opportunity to rehabilitate himself while incarcerated, we think a departure is within the district court's discretion. If the Sentencing Commission did not give adequate consideration to the mitigating circumstance of drug rehabilitation generally, *Maier*, 975 F.2d at 948, it certainly did not consider the unique constellation of mitigating circumstances in this case."

However, the court concluded that the supervised release term was unreasonable because defendant "could simply withdraw from the Butner program at any time [and] go free at the end of five years while similar defendants who committed similar crimes would serve another six to nine years." The district court should add two special conditions: (1) when defendant's prison term is over, he must "present to his probation officer certification from a drug treatment program at his place of incarceration that he has entered an available program at the first opportunity and remained in this program until the earlier of his release from confinement or the completion of the program, and that he is currently drug-free," and (2) he must submit to drug testing during his supervised release and, if so directed, must continue to participate in an approved drug treatment program.

U.S. v. Williams, 65 F.3d 301, 303–09 (2d Cir. 1995).

See *Outline* at VI.C.4.a.

Offense Conduct

Calculating Weight of Drugs

Tenth Circuit holds that waste by-products should not be included in weight of methamphetamine mixture for mandatory minimum calculation. Defendant pled guilty in 1989 to possession with intent to manufacture methamphetamine. He possessed 28 grams of pure methamphetamine that was combined with waste water in a mixture weighing 32 kilograms, and his 188-month sentence was based on the entire weight of the mixture. In Nov. 1993, §2D1.1, comment. (n.1), was amended to exclude materials, such as waste water, that must be separated from a drug "mixture or substance" before use. The amendment was made retroactive, and defendant filed a motion under 18 U.S.C. §3582(c) for resentencing. The district court granted the motion and sentenced defendant to the 60-month mandatory minimum term required for offenses involving 10 or more grams of methamphetamine. The government argued that the amended guideline definition does not control for purposes of 21 U.S.C. §841(b), and that defendant should receive a 10-year mandatory minimum for possessing "1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine."

The appellate court affirmed. Although in *U.S. v. Killion,* 7 F.3d 927 (10th Cir. 1993), decided before the 1993 amendment, the court had held that the weight of waste by-products may be used to calculate base offense levels under §2D1.1, "we have never specifically interpreted [§841(b)] apart from the guideline to require the inclusion of waste water in its definition of 'mixture or substance.'" The court looked to *Chapman v. U.S.,* 500 U.S. 453 (1991), and its finding "that Congress 'adopted a "market-oriented" approach to punishing drug trafficking,' which punished according to the quantity distributed 'rather than the amount of pure drug involved.' . . . *Chapman*'s recognition of Congress' 'market-oriented' approach dictates that we not treat unusable drug mixtures as if they were usable. . . . This usable/unusable distinction . . . [in defining] 'mixture or substances' for statutory purposes also permits us to refer to the guideline definition and 'adopt a congruent interpretation of the statutory term as an original matter.'" Concluding that there are persuasive reasons to "construe 'mixture or substance' in section 841 to be consistent with the guideline commentary as revised," such as avoiding "unnecessary conflict and confusion," the court held "that section 841 does not include the weight of waste by-products in the measurement of a 'mixture or substance.'"

U.S. v. Richards, 67 F.3d 1531, 1534–38 (10th Cir. 1995) (Baldock, J., dissenting).

See *Outline* at II.B.1.

Sixth Circuit holds that weight of "liquid LSD" should be calculated under amended guideline method, but that *Chapman* still applies to calculation for mandatory minimum. Defendant was originally sentenced on the basis of the total weight of 6.2 grams of a "liquid LSD" mixture, which consisted of 5.1 milligrams of pure LSD dissolved in a liquid. After the Nov. 1, 1993, amendment to §2D1.1 changed the way LSD weight was calculated under the Guidelines (Amendment 488) and was made retroactive, defendant filed a motion for reduction of sentence. The district court denied the motion, holding that Amendment 488 did not apply because the new method involved LSD on a carrier medium and defendant's offense involved liquid LSD without a carrier medium.

The appellate court remanded. Although Amendment 488 does not refer to liquid LSD, "Application Note 18 provides that, in the case of liquid LSD, 'using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.' Guidelines, §2D1.1. By allowing an upward departure in cases where a carrier medium is not used, the Sentencing Commission remains consistent with the market-oriented approach to sentencing for drug crimes. Using the 0.4 milligram standard, rather than the actual weight of the liquid, to measure dosage seems to be the logical means to determine the level of departure. Therefore, Defendant's sentence under the Guidelines must be recalculated accordingly."

Using only the 5.1 milligrams of pure LSD results in a guideline range for defendant of 10–16 months. "If the district court finds that this sentence does not reflect the seriousness of Defendant's offense, it may depart upward by applying the 0.4 milligram standard of Amendment 488. According to the Drug Enforcement Agency, the quantity of pure LSD per dose is 0.05 milligrams. When divided by 0.05 milligrams, the 5.1 milligrams of LSD involved in Defendant's case results in 102 doses of the drug. When the 102 doses are multiplied by Amendment 488's 0.4 milligram standard weight for each dose, the resulting weight is 40.8 milligrams. In this case, no increase in the sentencing level results. The base offense level for less than 50 milligrams of LSD is level 12, requiring a sentence of 10–16 months." *See also U.S. v. Turner,* 59 F.3d 481, 484–91 (4th Cir. 1995) (in light of Amendment 488 and Note 18, use weight of pure LSD in liquid LSD and depart if appropriate; however, if weight of pure LSD cannot be adequately proved, calculate weight by determining number of doses in liquid LSD and multiplying by DEA standardized figure of 0.05 mg of pure LSD per dose) [8 *GSU* #1].

However, because the Sixth Circuit has held "that Amendment 488 does not overrule" *Chapman v. U.S.,* 500 U.S. 453 (1991), "courts should continue to use the entire weight of LSD and its carrier medium to determine the mandatory minimum sentence required by statute, while using the standardized weight to determine the sentencing range provided in the guidelines. . . . When *Chapman* is applied to this case, the weight of the liquid LSD, 6.2 grams, triggers the five year mandatory minimum sentence for Defendant."

U.S. v. Ingram, 67 F.3d 126, 128–29 (6th Cir. 1995).

See *Outline* at II.B.1.

Determining the Sentence

Consecutive or Concurrent Sentences

Seventh Circuit holds that home detention is not a "term of imprisonment" under §5G1.3. When defendant was sentenced in federal court she had served a 14-month state prison term and had been in home detention for over a year on the same offense. The federal court credited the 14-month prison term against her federal sentence because the state offense had been fully accounted for in determining the sentence for the related federal charge; however, the court refused to credit the time spent in home detention. Defendant appealed, arguing that §5G1.3(b) required the court to credit her home detention as an "undischarged term of imprisonment" attributable to offenses "fully taken into account in the determination of the offense level for the instant offense."

The appellate court affirmed the sentence, concluding that "term of imprisonment" must be defined under federal law and that the Guidelines do not treat home detention as imprisonment. Using state definitions "would lead to divergent aggregate sanctions depending on which state the crime occurred in, undermining the most basic purpose of the Sentencing Reform Act of 1984 and the Guidelines themselves. The meaning of 'imprisonment' therefore is a question of federal law, one depending on what states *do* rather than on the labels they attach to their sanctions. . . . 'Imprisonment' is a word used throughout the Guidelines to denote time in a penal institution. . . . Section 7B1.3(d) permits a judge to require a recidivist to serve a period of 'home detention' in addition to a period of 'imprisonment,' showing that the Guidelines distinguish the two. . . . 'Home detention' differs from 'imprisonment' throughout the Guidelines' schema. It is not 'imprisonment' but is a 'substitute for imprisonment.' *See* §5B1.4(b)(20). . . . Unless something in §5G1.3 overrides this understanding, Phipps's sentence is just right." *But cf. U.S. v. French,* 46 F.3d 710, 717 (8th Cir. 1995) (using state law to hold that parole term was an "undischarged term of imprisonment" for §5G1.3(b)).

U.S. v. Phipps, 68 F.3d 159, 161–62 (7th Cir. 1995).

See *Outline* generally at V.A.3.

Supervised Release and Probation

Ninth Circuit holds that courts may not order repayment of court-appointed attorney's fees as condition of supervised release, later holds same for probation. In the first case, the district court ordered as a condition of defendant's supervised release that he repay the Criminal Justice Act attorney's fees expended on his behalf within one year of his release from prison; failure to comply would result in reincarceration. The appellate court reversed. Supervised release is governed by 18 U.S.C. §3583(d), which sets mandatory conditions and "then states that a court may impose additional supervised release conditions that meet the following criteria. First, they must be reasonably related to the factors set forth in §§3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D). These factors are: consideration of 'the nature and circumstance of the offense and the history and characteristics of the defendant;' 'to afford adequate deterrence to criminal conduct;' 'to protect the public from further crimes of the defendant;' and 'to provide the defendant with needed [training], medical care, or other correctional treatment in the most effective manner.' . . . The recoupment order simply bears no relationship to any of these goals. It is not related to Eyler's underlying criminal conduct—unlawful possession of firearms—and has no rehabilitative effects. Nor does it further any deterrence goals, protect the public from future crimes, or provide Eyler with any training or treatment. . . . The discretion of a district court to impose conditions of supervised release that it considers appropriate is limited by the express provisions of §3853(d). A condition that a defendant repay CJA attorneys fees violates these provisions and, accordingly, exceeds the district court's authority."

U.S. v. Eyler, 67 F.3d 1386, 1393–94 (9th Cir. 1995).

See *Outline* at V.C.

In the later case, defendant was sentenced to probation with the condition that he repay his CJA attorney's fees within one year. The appellate court reversed. "The statute governing probation, 18 U.S.C. §3563, . . . allows for the imposition of discretionary conditions as long as they are reasonably related to the purposes of sentencing in 18 U.S.C. §3553(a)(1) & (2)." Reimbursement of attorney's fees is not a mandatory condition of probation, and in the case above the court held that it is not reasonably related to the goals of §§3553(a)(1) and (a)(2)(B)–(D). "Therefore, the question before us is whether the repayment of attorney's fees is reasonably related to [the purposes of] 18 U.S.C. §3553(a)(2)(A), and whether it involves only such deprivation of liberty or property as is reasonably necessary to accomplish the purposes of sentencing. We conclude that repayment of attorney's fees is not a valid condition of probation because it is not reasonably related 'to the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,' 18 U.S.C. §3553(a)(2)(A). We also conclude that because the government has a number of other less drastic means by which it can enforce a court order to repay attorney's fees, conditioning probation on repayment of fees is not reasonably necessary to any legitimate sentencing objective."

U.S. v. Lorenzini, No. 94-30409 (9th Cir. Dec. 13, 1995) (Reinhardt, J.) (Fernandez, J., dissenting). Cases before the Sentencing Reform Act of 1984 took effect split on whether former 18 U.S.C. §3561 authorized repayment of attorney's fees as a condition of probation. *Compare U.S. v. Gurtunca,* 836 F.2d 283, 287–88 (7th Cir. 1987) (authorized, but lack of funds would be defense against revocation for nonpayment) *and U.S. v. Santarpio,* 560 F.2d 448, 455–56 (1st Cir. 1977) (same—"the condition cannot be enforced so as to conflict with Hamperian's sixth amendment rights; if Hamperian is unable to pay the fees, revocation of probation for nonpayment would be patently unconstitutional") *with U.S. v. Jimenez,* 600 F.2d 1172, 1174–75 (5th Cir. 1979) (§3561 does not allow for reimbursement as condition of probation).

See *Outline* generally at V.B.

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Offense Conduct

Calculating Weight of Drugs

Supreme Court reaffirms *Chapman*, holds that LSD carrier medium is included in weight calculation for mandatory minimum. In *Chapman v. U.S.*, 500 U.S. 453, 468 (1991), the Supreme Court held that the weight of the carrier medium is included when determining the weight of LSD for mandatory minimum sentences under 21 U.S.C. §841(b)(1). After *Chapman*, the Guidelines were amended to provide a new method of establishing the weight of LSD based on the number of doses and an assigned weight per dose, rather than using the actual weight of whatever carrier medium was used. *See* §2D1.1(c)(H) & comment. (n.16) (formerly n.18, effective Nov. 1, 1993). Petitioner in this case was originally sentenced to 192 months before the Guidelines were amended and was subject to a mandatory 10-year minimum term because the combined weight of the LSD and blotter paper exceeded 10 grams. After the amendment was made retroactive, he petitioned for resentencing under the new guideline method and argued that this method should also be used for the §841(b)(1) calculation. His guideline range was reduced to 70–87 months (based on 4.58 grams of LSD under the new method), but the district court held that *Chapman* still applied for the mandatory minimum and sentenced petitioner to 10 years. The Seventh Circuit affirmed. *See U.S. v. Neal,* 46 F.3d 1405, 1408–11 (7th Cir. 1995) (en banc).

The Supreme Court unanimously affirmed. "While acknowledging that the [Sentencing] Commission's expertise and the design of the Guidelines may be of potential weight and relevance in other contexts, we conclude that the Commission's choice of an alternative methodology for weighing LSD does not alter our interpretation of the statute in *Chapman*. In any event, principles of stare decisis require that we adhere to our earlier decision. . . . Entrusted within its sphere to make policy judgments, the Commission may abandon its old methods in favor of what it has deemed a more desirable 'approach' to calculating LSD quantities . . . . We, however, do not have the same latitude to forsake prior interpretations of a statute. True, there may be little in logic to defend the statute's treatment of LSD; it results in significant disparity of punishment meted out to LSD offenders relative to other narcotics traffickers. . . . Even so, Congress, not this Court, has the responsibility for revising its statutes. . . . We hold that §841(b)(1) directs a sentencing court to take into account the actual weight of the blotter paper with its absorbed LSD, even though the Sentencing Guidelines require a different method of calculating the weight of an LSD mixture or substance."

Neal v. U.S., No. 94-9088 (U.S. Jan. 22, 1996) (Kennedy, J.).

See *Outline* at II.B.1.

Possession of Weapon by Drug Defendant

Ninth Circuit holds that §2D1.1(b)(1) enhancement cannot be given to defendant acquitted on §924(c) charge. Defendant was convicted of a drug offense but acquitted on a charge of using or carrying a firearm in relation to that offense, 18 U.S.C. §924(c). At sentencing, he received the §2D1.1(b)(1) enhancement for possessing a weapon during a drug offense. He appealed, arguing that acquittal on a §924(c) charge precludes application of §2D1.1(b)(1), a claim rejected by all circuits that have considered the issue. See cases in *Outline* at section II.C.4.

However, the appellate court agreed with defendant and reversed, reasoning that in *U.S. v. Brady,* 928 F.3d 844, 851 (9th Cir. 1991), it had held that "a district court sentencing a criminal defendant for the offense of conviction cannot reconsider facts that the jury necessarily rejected by its acquittal of the defendant on another count." The court rejected the government's argument that "the district court's determination that Watts possessed a firearm is not a reconsideration of facts rejected by the jury, because the jury could have acquitted Watts on the section 924(c) charge because it believed that Watts possessed a firearm during the offense but that the firearm was not connected to the offense. . . . The connection of a firearm to the offense of conviction, although not an *element* of the weapon enhancement under the Guidelines, is nonetheless relevant. The commentary to U.S.S.G. §2D1.1(b)(1) provides an exception to the enhancement if the defendant can show that 'it is clearly improbable that the weapon was connected with the offense.' . . . Thus, the connection between the firearm and the predicate offense is relevant under both the sentencing enhancement and section 924(c); the only difference between U.S.S.G. §2D1.1(b)(1) and section 924(c) is the assignment and standard of the burden of proof regarding this connection. We held in *Brady* that a sentencing judge may not, 'under *any* standard of proof,' rely on facts of which the defendant was acquitted."

U.S. v. Watts, 67 F.3d 790, 796–98 (9th Cir. 1995). *Cf. Bailey v. U.S.,* 116 S. Ct. 501, 506 (1995) ("conviction for 'use' of a firearm under §924(c)(1) requires more than a showing of mere possession").

See *Outline* at I.A.3 and II.C.4.

Departures

Mitigating Circumstances

Second Circuit affirms downward departure in "close case," deferring to district court's "better feel" for the circumstances. Defendant was convicted of 22 counts involving fraudulent conduct against the government. A vice president of Grumman Data Systems Corp., he negotiated a contract with NASA. However, he violated federal contracting law by not truthfully disclosing certain pricing data that led to a significant—and illegal—financial benefit to Grumman. The sentencing judge departed downward by seven levels, partly because the calculated loss "significantly . . . overstate[d] the seriousness of the defendant's conduct." *See* §2F1.1, comment. (n.7(b)). The judge also concluded that there were mitigating circumstances that warranted departure under §5K2.0, namely that "(i) Broderson had sought only to benefit his employer, Grumman, and had received no personal benefit from the fraud; (ii) under existing market conditions, the contract was favorable to the government; and (iii) the government received restitution from Grumman."

Although the appellate court remanded on another sentencing issue, it rejected the government's challenge to the downward departure and concluded that the circumstances here fell "outside the 'heartland' of fraud cases. In addressing that issue, we adopt then-Chief Judge Breyer's analysis in *U.S. v. Rivera,* 994 F.2d 942 (1st Cir. 1993). . . . The departure in the present case can be justified, if at all, only as a 'discouraged departure.' Ordinarily, payment of restitution is not an appropriate basis for downward departure under Section 5K2.0 because it is adequately taken into account by Guidelines Section 3E1.1, dealing with acceptance of responsibility. . . . Nor is lack of personal profit ordinarily a ground for departure, because the Commission generally took that factor into account in drafting the Guidelines. . . . Finally, the fact that the contract was favorable to NASA given existing market conditions arguably does not mitigate Broderson's failure to observe [federal contract] obligations."

"Nevertheless, we also recognize the district court's 'better "feel" for the unique circumstances of the particular case before it,' *Rivera,* 994 F.2d at 951, and 'special competence' in determining whether that case falls within the 'heartland.' *Id.* . . . Judge Mishler concluded that this confluence of circumstances was not taken into account by the Guidelines . . . and that the loss calculation . . . overstated the seriousness of Broderson's offense . . . . Although we regard the case as a close one, we believe that Judge Mishler was within his discretion in downwardly departing and that the departure was reasonable. We agree with *Rivera* that courts of appeals should recognize that they hear relatively few Guidelines cases compared to district courts and that district courts thus have a 'special competence' in determining whether a case is outside the 'heartland.' 994 F.2d at 951. Although we might have reached a contrary decision . . . , we acknowledge that there are grounds on which his violation of [these laws] are distinguishable from classic instances of fraud. We thus defer to Judge Mishler's view of the case."

U.S. v. Broderson, 67 F.3d 452, 458–59 (2d Cir. 1995).

See *Outline* at VI.C.3, 5.a, and X.A.1.

Criminal History

Career Offender Provision

First Circuit upholds amendment to definition of "Offense Statutory Maximum." The career offender guideline, §4B1.1, uses a defendant's "Offense Statutory Maximum" sentence for the offense of conviction in determining the applicable offense level. The phrase was first defined in a Nov. 1989 amendment to §4B1.1's commentary as "the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense." Some circuits held that the maximum included applicable statutory enhancements that increased the statutory maximum sentence, like those in 21 U.S.C. §841(b)(1). Amendment 506, effective Nov. 1, 1994, changed the definition to specify that the maximum does "not includ[e] any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." *See* §4B1.1, comment. (n.2). This amendment was made retroactive under §1B1.10(c).

Ruling in four cases that were consolidated for this appeal, the appellate court upheld the changed definition, concluding that it is a reasonable interpretation of the statute that authorized the career offender guideline, 28 U.S.C. §994(h). That section instructs the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for [career offenders]." Looking at the language of the statute and the legislative history, the court found "no clear congressional directive regarding the meaning of the term 'maximum' as that term is used in section 994(h)." In such a case, "an interpretation by the agency that administers it will prevail as long as the interpretation is reasonable under the statute. . . . We believe that the Commission's act in defining 'maximum' to refer to the unenhanced maximum term of imprisonment . . . furnishes a reasonable interpretation of section 994(h). The statute explicitly refers to 'categories of defendants,' namely, repeat violent criminals and repeat drug offenders, and does not suggest that each individual offender must receive the highest sentence available against him. The Career Offender Guideline, read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests."

In one of the cases on appeal, the district court agreed that the new definition was valid but declined to apply it retroactively to reduce defendant's sentence. The appellate court held that the district court properly acted

within the discretion granted under §1B1.10(a) and 18 U.S.C. §3582(c)(2) in choosing not to reduce the sentence. Another sentence that had been reduced was affirmed, and the two where the district court held that Amendment 506 was invalid were remanded.

U.S. v. LaBonte, 70 F.3d 1396, 1403–12 (1st Cir. 1995) (Stahl, J., dissenting).

See *Outline* at IV.B.3.

Sentencing Procedure

Plea Bargaining

Eighth Circuit holds that district court may not defeat purposes of plea agreement by departing upward based on dismissed charge. Under a plea agreement, defendant pled guilty to both conspiracy to transfer and aiding and abetting the transfer of stolen property in interstate commerce. The parties anticipated the guideline range would be 24–30 months, with a total offense level of 13, and the government agreed to file a §5K1.1 motion. However, they discovered that defendant's guilty plea to conspiracy would lead to a significantly longer sentence because the plea included a stipulation that defendant participated in an armed robbery related to the offense—that would require use of the guideline for armed robbery (level 26) and a guideline range of 70–87 months. Defendant and the government reached a new agreement whereby defendant would withdraw his plea to the conspiracy and the government would dismiss that count at sentencing. The district court followed the parties' calculations in reaching a 24–30 month range, but departed upward under §5K2.0 on the ground that defendant's participation in the armed robbery was relevant conduct that was not adequately reflected in the guideline sentence. The court also departed downward on the government's §5K1.1 motion and, without explaining how it apportioned the two departures, sentenced defendant to 30 months.

The appellate court remanded. "The sentencing court erred in considering conduct from the dismissed count as the basis for an upward departure under section 5K2.0 in clear opposition to the intentions of the parties as embodied in their plea agreement. A contrary rule would allow the sentencing court to eviscerate the plea bargaining process that is vital to the courts' administration. . . . Permitting sentencing courts to accept a defendant's guilty plea and yet disavow the terms of and intent behind the bargain . . . would bring an unacceptable level of instability to the process. Unquestionably, the district courts may consider conduct from uncharged or dismissed counts for certain purposes under the guidelines," such as adjustments and other specific offense characteristics, and for criminal history departures under §4A1.3(e). "The circuit courts are divided, however, on the question of whether conduct from dismissed counts may be used as a basis for an upward departure under section 5K2.0. Although we note that each case implicates a different constellation of variables under the guidelines, our holding is generally consistent with the Third and Ninth Circuits." *See U.S. v. Thomas,* 961 F.2d 1110, 1120–22 (3d Cir. 1992); *U.S. v. Castro-Cervantes,* 927 F.2d 1079, 1082 (9th Cir. 1990). "The court was not entitled to defeat the parties' expectations by imposing a more severe sentence using Harris's role in the armed robbery that preceded the offense of conviction to depart upward pursuant to §5K2.0. For that reason, we remand the case to the district court with instructions either to resentence Harris in a manner consistent with this opinion or to reject the plea agreement and allow Harris the opportunity to withdraw his plea as directed by [Fed. R. Crim. P.] 11(e)(4)."

U.S. v. Harris, 70 F.3d 1001, 1003–04 (8th Cir. 1995).

See *Outline* at IX.A.1.

Violation of Supervised Release

Sixth Circuit holds that court may consider need for drug rehabilitation in setting length of revocation sentence, but may not order defendant to participate in intensive in-prison drug treatment program. Defendant was originally sentenced to three years' probation. His probation was revoked for drug use and he was sentenced to six months' imprisonment, followed by three years of supervised release. His supervised release was revoked under 18 U.S.C. §3583(g) because he possessed cocaine; he had also failed to complete a required drug treatment program. By the time he was sentenced for the revocation, defendant had been jailed for six months, and his recommended sentence under USSG §7B1.4 was only 3–9 months. "The District Court expressed concern that if defendant were sentenced to a term of nine months he would only be incarcerated an additional three months, a period not long enough to insure his completion of a prison drug treatment program." Therefore, because of defendant's extensive history of drug use and drug-related problems, the court "imposed a sentence of sixteen months with the requirement that defendant participate in an intensive drug treatment program while in custody." Defendant appealed the length of sentence and the required treatment.

The appellate court upheld the length of sentence but not the order for treatment. "Unlike the statutory provisions governing initial sentencing and sentencing upon permissive revocation of supervised release, the statutory provisions governing mandatory revocation of supervised release neither instruct nor prohibit the sentencing court from considering rehabilitative goals in determining the length of a sentence upon mandatory revocation of supervised release. [*See* 18 U.S.C. §§3553(a), 3583(e), and 3583(g).] However, we can identify no reason that a court sentencing a defendant upon mandatory revocation of supervised release should not be able to consider rehabilitative goals in arriving at the length of a sentence

while a court imposing either an initial sentence [within the guideline range] or a sentence upon permissive revocation of supervised release may properly consider that need." Therefore, "a district court may properly consider a defendant's rehabilitative needs in setting the length of imprisonment within the range prescribed by statute."

However, the drug treatment requirement was not authorized. "Although statute and federal regulations do not squarely address whether it is within the sentencing court's authority to order a defendant's participation in a drug rehabilitation program, they do indicate that it is solely within the authority of the Federal Bureau of Prisons ('Bureau') to select those prisoners who will be best served by participation in such programs. . . . Therefore, we conclude that it was beyond the District Court's authority to order defendant's participation in a drug treatment program while incarcerated." However, the district court "may recommend that a prisoner receive drug rehabilitation treatment while incarcerated," and on remand it may "amend its order to recommend rather than mandate defendant's participation."

U.S. v. Jackson, 70 F.3d 874, 877–81 (6th Cir. 1995).

See *Outline* at VII.B.1 and 2.

General Application

Sentencing Factors

Ninth Circuit supersedes prior decisions in *Camp*, holds that state-immunized testimony that was not compelled may be used for departure. In a state proceeding unrelated to the instant federal offense, defendants were granted transactional immunity for all offenses relating to a 1979 shooting death. When defendants were later sentenced in federal court, the district court found that defendants' roles in the 1979 death warranted upward departure under §4A1.3. The appellate court originally remanded, holding that defendants' state transactional immunity required there be "an independent, legitimate source" regarding defendants' role in the death before that evidence could be used for federal sentencing. *See U.S. v. Camp,* 58 F.3d 491, 492–93 (9th Cir. 1995). That opinion was later amended, with the court stressing that the grant of immunity must have been initiated by the state so that the self-incriminating information was state-induced. *U.S. v. Camp,* 66 F.3d 185 (9th Cir. 1995), *withdrawn,* 66 F.3d 187 (9th Cir. 1995).

The court has now amended the original opinion to affirm the sentence, holding that "a federal court may consider information revealed by a defendant in exchange for state transactional immunity." The court concluded that the rule of *Murphy v. Waterfront Comm'n,* 378 U.S. 52, 79 (1964), limiting the use of incriminating information given by a state witness, "applies only if the witness [was] compelled to testify. Otherwise, there are no Fifth Amendment implications. . . . It does not appear that the Camps were constrained in any way to accept the state's offer of immunity." They "had the option to remain silent," and "the record does not suggest that any negative consequences would have followed if [they] had invoked the privilege. . . . Absent any Fifth Amendment implications, the Camps' immunity agreement had the same effect as a cooperation agreement. A sentencing judge has discretion to depart upward when the defendant's criminal history category is inadequate because 'for appropriate reasons, such as cooperation . . . [he] had previously received an extremely lenient sentence for a serious offense.' USSG §4A1.3, p.s. An upward departure is similarly appropriate here. Because they were never charged in connection with [the] death, the Camps' criminal history categories do not reflect gravely serious criminal conduct. The court did not err in taking that conduct into account at sentencing."

U.S. v. Camp, No. 94-30292 (9th Cir. Dec. 22, 1995) (Wright, J.).

See *Outline* at I.C and VI.A.1.c.

Note: Readers should delete the entries for *Camp* in the *Outline* at sections I.C (p. 9) and VI.A.1.c (p.148), 7 *GSU* #11 (p.3), and 8 *GSU* #2 (p.4).

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Determining the Sentence

"Safety Valve" Provision

Tenth Circuit holds that §3553(f)(5) requires a defendant to divulge all known information about the offense and related conduct, not just defendant's own conduct. Defendant was convicted of conspiracy to possess cocaine with intent to distribute. The district court departed downward from the 10-year mandatory minimum after concluding that, because defendant wrote a letter detailing his own involvement in the conspiracy, he qualified for the "safety valve" departure under 18 U.S.C. §3553(f), USSG §5C1.2. The government appealed, arguing that defendant's refusal to talk about others involved in the conspiracy violated the requirement in §3553(f)(5) to "truthfully provide to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." The government claimed that a defendant must "tell the government all he knows about the offense of conviction and the relevant conduct, including the identities and participation of others," but defendant argued that he need only detail his own personal involvement in the crime.

The appellate court agreed with the government and remanded. "The phrase 'all information and evidence' is obviously broad. The Application Notes to §5C1.2 define 'offense or offenses that were part of the same course of conduct or of a common scheme or plan' to mean 'the offense of conviction and all relevant conduct.' USSG §5C1.2, comment. (n.3). 'Relevant conduct' has in turn been defined to include 'in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.' USSG §1B1.3(a)(1)(B). Thus, the guidelines appear to require disclosure of 'all information' concerning the offense of conviction and the acts of others if the offense of conviction is a conspiracy or other joint activity. As applied to Mr. Acosta-Olivas, the guideline would therefore require disclosure of everything he knows about his own actions and those of his co-conspirators." The court rejected defendant's argument that this interpretation essentially duplicates USSG §5K1.1, noting that under §3553(f) the decision is made by the court and does not require a government motion, and the information does not have to be "relevant or useful" to the government.

"We therefore hold that the district court erred in interpreting §3553(f)(5) to require a defendant to reveal only information regarding his own involvement in the crime, not information he has relating to other participants. . . . If, at resentencing, the court makes a factual finding that, in deciding what information to disclose to the government, Mr. Acosta-Olivas relied upon the district court's interpretation of §3553(f)(5), the court shall allow him the opportunity to comply with the statute as this court has interpreted it in this opinion."

U.S. v. Acosta-Olivas, 71 F.3d 375, 377–80 (10th Cir. 1995).

Seventh Circuit holds that §3553(f) requires affirmative offer of information by defendant, does not duplicate USSG §3E1.1, and does not violate Fifth Amendment rights. Defendant pled guilty to conspiracy to distribute crack cocaine and was sentenced to a 10-year mandatory minimum term. He argued that he qualified for a lower term under 18 U.S.C. §3553(f) because he stipulated to the facts of the offense in his plea agreement and the government never requested additional information. The district court denied his §3553(f) motion, however, because defendant made no further attempts to cooperate with the government and reveal additional details of the offense.

The appellate court affirmed, concluding that "§3553(f) was intended to benefit only those defendants who truly cooperate. Thus, to qualify for relief under §3553(f), a defendant must demonstrate to the court that he has made a good faith attempt to cooperate with the authorities. . . . Although he stipulated to the basic details of his offense conduct, he made no further efforts to cooperate. He failed to respond to a proffer letter sent by the government outlining the terms that would apply (*e.g.,* limited immunity) if he provided additional information. Furthermore, he did not initiate any contact with government officials offering to provide details of his involvement in drug dealing. Specifically, the government notes that [defendant] could have at least provided the name of the 'source' who sold him the crack cocaine. Before granting relief under §3553(f), the court may reasonably require a defendant to reveal information regarding his chain of distribution. . . . [I]t is [defendant's] duty to satisfy the court that he has 'truthfully provided to the Government all [of the] information and evidence . . . [that he] has concerning the offense.' . . . Although [defendant] is not required to provide information that the government expressly states that it does not want, he at least must offer what he has." *See also U.S. v. Wrenn,* 66 F.3d 1, 3 (1st Cir. 1995) (§3553(f) "con-

templates an affirmative act of cooperation with the government") [8 *GSU* #1].

The court also rejected defendant's claim that it was inconsistent to deny his §3553(f) motion after granting him the three-level reduction for acceptance of responsibility under §3E1.1, which required him to "truthfully admit[] the conduct comprising the offense(s) of conviction." "Although §3E1.1(a) forbids a defendant from falsely denying relevant conduct, . . . it imposes no duty on a defendant to volunteer any information aside from the conduct comprising the elements of the offense. . . . In contrast, §3553(f) states that a defendant must disclose 'all information' concerning the course of conduct—not simply the facts that form the basis for the criminal charge. Accordingly, the district court correctly held that §3553(f)(5) requires more than §3E1.1(a)."

Defendant's final argument, that requiring him to volunteer information of his criminal conduct beyond the offense of conviction violates his Fifth Amendment right against self-incrimination, also failed. "[R]equiring defendants to admit past criminal conduct in order to gain relief from statutory minimum sentences does not implicate the right against self-incrimination. In a similar line of cases, we have held that requiring a defendant to admit criminal conduct related to but distinct from the offense of conviction in order to gain a reduction for acceptance of responsibility does not implicate the Fifth Amendment" because it does not penalize defendants but denies a benefit. "The same is true of §3553(f), which requires a defendant to provide complete and truthful details concerning his offense in order to qualify for a sentence below the statutory minimum."

U.S. v. Arrington, 73 F.3d 144, 148–50 (7th Cir. 1996).

Second and Ninth Circuits hold that downward criminal history departure for defendant with more than one criminal history point cannot qualify defendant for §3553(f). In the Second Circuit, defendant faced a five-year mandatory minimum on a cocaine charge. He had four criminal history points, but the district court concluded that overrepresented his criminal history and departed under §4A1.3 to criminal history category I, which resulted in a guideline range of 57–71 months. The court imposed a 60-month sentence after rejecting defendant's argument that he qualified for a departure under 18 U.S.C. §3553(f) because the departure effectively left him with only one criminal history point.

The appellate court affirmed. "Section 3553(f) states that the safety-valve provision is to apply only where 'the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines.'" The relevant guideline, §5C1.2, has commentary that "interprets this passage to mean 'more than one criminal history point as determined under §4A1.1 (Criminal History Category).' U.S.S.G. §5C1.2 comment. (n.1). Section 4A1.1 is the schedule that specifies how a sentencing court should calculate a defendant's criminal history points. It is not disputed that Resto has four criminal history points, as determined under §4A1.1. Notwithstanding that the sentencing judge elected to depart by treating Resto as falling in Criminal History Category I, rather than Category III where his four points originally placed him, he nonetheless has four criminal history points. He is thus ineligible for the safety valve provision of §3553(f)."

U.S. v. Resto, 74 F.3d 22, 27–28 (2d Cir. 1996).

The Ninth Circuit defendant was convicted of a methamphetamine offense and faced a 10-year mandatory minimum. He had two criminal history points under §4A1.2(c)(1) for two offenses of driving with a suspended license, and was thus ineligible for departure under §3553(f). The district court held that criminal history category II overrepresented defendant's criminal history and departed under §4A1.3 to category I and a guideline range of 108–135 months, but concluded that this did not make defendant eligible for a §3553(f) departure and sentenced him to 120 months.

The appellate court agreed and affirmed. Under §3553(f)(1) the district court "must find *inter alia* that 'the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines.' . . . Section 3553(f) is not ambiguous. It explicitly precludes departure from the mandatory minimum provisions of 21 U.S.C. §841 if the record shows that a defendant has more than one criminal history point. . . . Assuming arguendo that there is merit to [defendant's] argument that a mandatory minimum sentence should not be imposed where the criminal history category overrepresents the seriousness of a defendant's prior criminal history, only Congress can provide a remedy."

U.S. v. Valencia-Andrade, 72 F.3d 770, 773–74 (9th Cir. 1995).

See *Outline* generally at V.F for all cases above.

Departures

Mitigating Circumstances

First Circuit holds departure may be considered when enhancement based on acquitted conduct mandates life sentence. Defendant was tried in state court for murder and was acquitted. Later he was indicted in federal court on firearms and other charges arising out of the murders. Convicted on two counts, defendant was sentenced under §2K2.1 (Nov. 1990) for the firearms offense. Section 2K2.1(c)(2) directed that if defendant "used or possessed the firearm in connection with the commission or attempted commission of another offense, apply §2X1.1 . . . in respect to that other offense, if the resulting offense level is greater than that determined above." The court

found that the murders were "another offense," that defendant had committed the murders, and that the "object offense" for purposes of §2X1.1 was first degree murder. That gave defendant an offense level of 43, which, because he qualified for no reductions, mandated a sentence of life imprisonment. (Later versions of the Guidelines give the same result.) Defendant's sentence on the firearms count without applying §2K2.1(c)(2) would have been 30–37 months, but his total sentence would have been 262–327 months because he qualified as an armed career criminal on the other count.

The appellate court rejected defendant's claim that the method by which the sentence was reached violated due process, but held that the district court erred in thinking it did not have discretion to consider downward departure in this situation. Noting that the Supreme Court "has cautioned against permitting a sentence enhancement to be the 'tail which wags the dog of the substantive offense,'" the court concluded that this was such a case. "The effect here has been to permit the harshest penalty outside of capital punishment to be imposed not for conduct charged and convicted but for other conduct as to which there was, at sentencing, at best a shadow of the usual procedural protections such as the requirement of proof beyond a reasonable doubt. . . . When put to that proof in state court, the government failed. The punishment imposed in view of this other conduct far outstripped in degree and kind the punishment Lombard would otherwise have received for the offense of conviction." Under §2K2.1 "the cross-reference to the first-degree murder guideline essentially *displaced* the lower Guidelines range that otherwise would have applied. As a result, the sentence to be imposed for Lombard's firearms conviction was the same as the sentence that would have been imposed for a federal murder conviction: a mandatory term of life. Despite the nominal characterization of the murders as conduct that was considered in 'enhancing' or 'adjusting' Lombard's firearms conviction, the reality is that the murders were treated as the gravamen of the offense." The court also noted that "in *no circumstances* under Maine law would Lombard have been subject to a *mandatory* life sentence. . . . We would be hard put to think of a better example of a case in which a sentence 'enhancement' might be described as a 'tail which wags the dog' of the defendant's offense of conviction."

Following the principles governing departure set forth in *U.S. v. Rivera,* 994 F.2d 942 (1st Cir. 1993), the court held that "the district court had authority to avoid any unfairness in Lombard's sentence through the mechanism of downward departure. . . . The facts and circumstances of this case present a whole greater than the sum of its parts and distinguish it, from a constitutional perspective, from other cases that have involved facially similar issues. The specific question from the perspective of the Guidelines and under U.S.S.G. §5K2.0 is whether these features of the case—*e.g.,* the state court acquittal and the fact that the federal sentence may exceed any state sentence that would have attached to a murder conviction; the paramount seriousness of the 'enhancing conduct'; the magnitude of the 'enhancement'; the disproportionality between the sentence and the offense of conviction as well as between the enhancement and the base sentence; and the absence of a statutory maximum for the offense of conviction—taken in combination, make this case 'unusual' and remove it from the 'heartland' of the guideline (§2K2.1) that yielded the mandatory life sentence. This case is outside the 'heartland.'"

U.S. v. Lombard, 72 F.3d 170, 174–87 (1st Cir. 1995).

See *Outline* generally at VI.C.5.a.

Sixth Circuit remands to consider downward departure based on coercion or duress. Defendant and her husband committed bank fraud in several states. She pled guilty to bank fraud, conspiracy, and firearms violations, and was sentenced to 46 months. The record indicated that defendant "has significant emotional problems and a history of drug and alcohol abuse associated with her experience of sexual and emotional abuse as a child. She also appears to have suffered serious physical and emotional abuse at the hands of Mr. Hall (her husband). Her reports of violence and gun-threats by Mr. Hall were corroborated by him in letters he wrote to her from prison." The appellate court noted that "[i]t would not be unreasonable to conclude that her husband beat and cajoled her into submission to his will," and a psychological evaluation of defendant described her as suffering from "post traumatic stress disorder" and "Battered Person Syndrome." On appeal, defendant argued that the district court failed to recognize its discretion to consider these circumstances as a basis for downward departure.

The appellate court agreed and remanded, holding that "there is overwhelming evidence that the Defendant's criminal actions resulted, at least in part, from the coercion and control exercised by her husband. On the record before us, she had not been involved in any bank fraud schemes before she met Mr. Hall, and, according to the forensics evaluation of the Bureau of Prisons, she continued her criminal activity only after he threatened to kill himself, to kill her, to hurt their friends and pets, and to commit bank robbery using violent means. . . . His own letters to Ms. Hall from prison describe scenes from the past in which he threatened her with a gun. . . . These circumstances indicate that a departure may be appropriate under U.S.S.G. §5K2.12, which permits departure because of serious coercion not amounting to a complete defense . . . . The failure of the probation report and the district court to take note of these circumstances or to discuss this issue indicates that it was not aware of the applicability of §5K2.12 and of its discretion to depart downward. It must consider coercion as a basis for depar-

ture. We therefore remand to the district court to make findings of fact and conclusions of law as to whether downward departure is appropriate for this Defendant, noting in particular the coercive effect of her husband's abuse in light of her related emotional problems."

U.S. v. Hall, 71 F.3d 569, 570–73 (6th Cir. 1995).

See *Outline* at VI.C.4.a.

D.C. Circuit rejects sentencing entrapment claim. Defendants were convicted on charges relating to four crack cocaine sales to undercover agents and, because of the amount involved and prior convictions, received mandatory life sentences under 21 U.S.C. §841(b). They argued that they should have been sentenced as if they sold powder cocaine rather than crack because the agents had insisted that the cocaine be in the form of crack and, at the first sale, refused to buy the powder cocaine defendants tried to sell until defendants found someone to "cook" it into crack. At trial, when one of the agents was asked why they insisted on crack rather than powder, he stated: "Well, crack cocaine is less expensive than [powder] cocaine, and we felt like through our investigation, that it takes fifty grams of crack cocaine to get any target over the mandatory ten years." Defendants claimed this demonstrated sentencing entrapment by the government.

The appellate court rejected defendants' claims and indicated that it did not view sentencing entrapment as a viable defense. "The theory appears to be that if the government induces a defendant to commit a more serious crime when he was predisposed to commit a less serious offense, the defendant should be sentenced only for the lesser offense. . . . But the Supreme Court has warned against using an entrapment defense to control law enforcement practices of which a court might disapprove. . . . The main element in any entrapment defense is rather the defendant's 'predisposition'—'whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime.' . . . Persons ready, willing and able to deal in drugs—persons like [defendants]—could hardly be described as innocents. These defendants showed no hesitation in committing the crimes for which they were convicted. Alone, this is enough to destroy their entrapment argument."

The court also rejected the possibility of an "outrageous-conduct defense" to reduce a statutorily-mandated sentence. If the government's conduct were so outrageous as to violate due process it would preclude prosecution. If the conduct was not that outrageous—"if, in other words, there was no violation of the Due Process Clause—it follows that those actions cannot serve as a basis for a court's disregarding the sentencing provisions."

U.S. v. Walls, 70 F.3d 1323, 1328–30 (D.C. Cir. 1995). *See also U.S. v. Miller,* 71 F.3d 813, 817–18 (11th Cir. 1996) (remanded: reiterating earlier holding "that sentencing entrapment is a defunct doctrine" and rejecting theory of "partial entrapment," holding district court could not sentence defendant as if he had sold powder instead of crack cocaine—defendant was clearly disposed to sell cocaine and arranged sale of crack after initial deal for powder fell through). *But see U.S. v. McClelland,* 72 F.3d 717, 725–26 (9th Cir. 1995) (affirming "imperfect entrapment" departure for defendant convicted in murder-for-hire attempt—although defendant initiated plan to kill his wife, he repeatedly expressed reluctance to carry it out and only went forward after the undercover informant defendant had asked to do the killing "repeatedly pushed McClelland to go forward").

See *Outline* at VI.C.4.c.

Note to Readers:

Beginning this year the Center will publish *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* once per year, instead of twice as we have in the past. We anticipate that the next issue will be distributed in July or August.

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Determining the Sentence

"Safety Valve" Provision

Fourth, Fifth, Sixth, and Eighth Circuits hold that defendant has burden of providing information to government to qualify for §3553(f) departure. The Fourth Circuit defendant was denied a downward departure under 18 U.S.C. §3553(f) and USSG §5C1.2 because he never "truthfully provided to the Government all information and evidence" he had about the marijuana conspiracy he pled guilty to. He argued on appeal that he was entitled to the departure because he was ready to provide information, but the government never asked for it.

The appellate court disagreed and affirmed. "Section 3553(f)(5) requires more than accepting responsibility for one's own acts; rather, satisfaction of §3553(f)(5) requires a defendant to disclose all he knows concerning both his involvement and that of any co-conspirators." Even if the information would be of no use to the government, "§3553(f)(5) requires a defendant to 'truthfully *provide to the Government* all information . . . concerning the offense.' 18 U.S.C. §3553(f)(5) (emphasis added). We believe this plain and unambiguous language obligates defendants to demonstrate, through affirmative conduct, that they have supplied truthful information to the Government." *Accord U.S. v. Arrington,* 73 F.3d 144, 148–50 (7th Cir. 1996) [8 *GSU* #5]. *See also U.S. v. Wrenn,* 66 F.3d 1, 3 (1st Cir. 1995) (§3553(f) "contemplates an affirmative act of cooperation with the government") [8 *GSU* #1].

The court rejected defendant's contention that the burden should be on the government, finding that "such a construction is not supported by §3553(f)(5)'s plain language, and it would lead to an absurd result. Under Ivester's proffered construction, those defendants facing statutorily-mandated minimum sentences for drug convictions who were not approached and debriefed by the Government could qualify for the reduction even though they *never* provided the Government with any information. Ivester's construction of §3553(f)(5) would essentially obviate the requirement that defendants 'provide' information."

The court also rejected the claim "that our construction of §3553(f)(5) is illogical because it requires defendants to become government informants and, as such, renders redundant substantial assistance departures under §3553(e) or its companion sentencing guidelines provision, U.S.S.G. §5K1.1," agreeing with the Tenth Circuit that the substantial assistance provisions have different requirements and procedures. *See U.S. v. Acosta-Olivas,* 71 F.3d 375, 379 (10th Cir. 1995) [8 *GSU* #5]. *Accord U.S. v. Thompson,* No. 95-50162 (9th Cir. Apr. 17, 1996) (Nelson, J.) (affirmed: two provisions differ).

U.S. v. Ivester, 75 F.3d 182, 184–85 (4th Cir. 1996) (Hall, J., dissenting). *Cf. U.S. v. Thompson,* 76 F.3d 166, 168–71 (7th Cir. 1996) (rejecting government claim that defendant did not truthfully provide all information: defendant "suffered from a diminished capacity to understand complex situations" and had "a low level of cognitive functioning," but she "provided the government all information and evidence she had concerning the offense" and "was forthright within the range of her ability," thus satisfying §5C1.2(5)'s requirements).

The Eighth Circuit rejected a defendant's claim that he had provided enough information to warrant departure, agreeing with the cases cited above that the burden is on defendant to truthfully provide all information about the offense. "To satisfy §3553(f)(5), Romo was required to disclose all the information he possessed about his involvement in the crime and his chain of distribution, including the identities and participation of others. . . . Romo had the burden to show, through affirmative conduct, that he gave the Government truthful information and evidence about the relevant crimes before sentencing. . . . Although Romo gave the Government some limited information about his crime, the presentence report indicated Romo did not tell the Government the whole story about his role in the distribution chain and his gang's involvement."

U.S. v. Romo, 81 F.3d 84, – (8th Cir. 1996). *See also U.S. v. Thompson,* No. 95-50162 (9th Cir. Apr. 17, 1996) (Nelson, J.) (affirmed: "we hold that a defendant must give the Government all the information he has concerning the offense, including the source of his drugs, to avail himself of the benefit of §5C1.2").

The Sixth Circuit, citing *Ivester* and *Wrenn*, held that "defendant did not carry his burden of proving that he was eligible for sentencing below the prescribed mandatory minimum. . . . The defendant's statement that he gave the government 'all they asked,' if true, does not satisfy his burden of proof under §3553(f)(5) and §5C1.2(5). These provisions clearly require an affirmative act by the defendant truthfully disclosing all the information he possesses that concerns his offense or related offenses."

U.S. v. Adu, No. 95-1488 (6th Cir. Apr. 15, 1996) (Lively, J.).

The Fifth Circuit also followed *Ivester* in holding that it was error to give defendant a §5C1.2 departure when he had made no effort to provide any information to the government. "Likewise, we conclude that the language of the safety valve provision indicates that the burden is on the defendant to provide the Government with all information and evidence regarding the offense. There is no indication that the Government must solicit the information. Further, the provision explains that if the information is not useful to the Government or if the Government is already aware of the information, the court is not precluded from finding that the defendant has sufficiently complied with subsection five, thus illustrating that the focus of subsection five is on the defendant's providing information, rather than on the Government's need for information."

U.S. v. Flanagan, 80 F.3d 143, 146–47 (5th Cir. 1996).

Eighth Circuit holds that defendant may not lie to government in interview and then satisfy §3553(f)(5) by admitting truth under cross-examination at sentencing hearing. Defendant, convicted on a cocaine conspiracy charge, had been arrested at an airport with a coconspirator who was posing as her husband. In an interview with the government after she pled guilty, defendant said that the man had posed as her husband (who was an airline employee) because he wanted her to obtain airline tickets available to airline employees and their families, but she denied that she had done so. At the sentencing hearing, however, the government produced several such tickets purchased by defendant and she admitted on cross-examination that she had obtained tickets on four occasions for the coconspirator, and that she lied to the government because she feared retribution from her employer. Although she otherwise qualified for a "safety valve" departure under 18 U.S.C. §3553(f), the district court sentenced her to the mandatory minimum after concluding she did not satisfy the requirement to truthfully provide all information to the government.

The appellate court affirmed, rejecting defendant's claim that "she provided all truthful information 'not later than the time of the sentencing hearing' under §3553(f)(5) because she admitted she provided [the coconspirator] with [employee] tickets at the sentencing hearing. Under Long's reading, defendants could deliberately mislead the government about material facts, yet retain eligibility for relief under §3553(f) by 'curing' their misstatement at the sentencing hearing. Although this would serve a sentencing court's interest in full disclosure for purposes of sentencing, we think Long overlooks the government's interest in full truthful disclosure when it interviews defendants. This interest is reflected in the text of §3553(f)(5) in the clause requiring the defendant's information be 'truthfully provided to the Government.' Only if Long had provided truthful information could the government have avoided the further investigation required to discover the airline ticket receipts."

U.S. v. Long, 77 F.3d 1060, 1062 (8th Cir. 1996) (per curiam).

Third Circuit holds that the safety valve provision cannot be applied to 21 U.S.C. §860, the "schoolyard" statute. Defendant was convicted on several drug charges, including four counts of distribution within 1,000 feet of a school, 21 U.S.C. §860. Defendant qualified for a safety valve departure on some of the drug counts, but the district court ruled that 18 U.S.C. §3553(f) could not be applied to §860 and sentenced defendant to a five-year mandatory minimum sentence. Defendant appealed, arguing that §860 is not a substantive offense but merely an enhancement of the penalty for §841, to which the safety valve provision may be applied.

The appellate court rejected defendant's argument and affirmed the sentence. "By its terms, 18 U.S.C. §3553(f) applies only to convictions under 21 U.S.C. §§841, 844, 846, 961 and 963. Section 860 is not one of the enumerated sections. It is a canon of statutory construction that the inclusion of certain provisions implies the exclusion of others. . . . In clear and unambiguous language, . . . 18 U.S.C. §3553(f) does not apply to convictions under 21 U.S.C. §860, the 'schoolyard' statute." The court also held that "§860 is a separate substantive offense, not a sentence enhancement provision. . . . [T]he language of the statute specifies §860 is a separate offense. Although §860 refers to §841, . . . it requires a separate and distinct element—distribution within 1,000 feet of a school. Distribution within 1,000 feet of a school must be charged and proven beyond a reasonable doubt in order to obtain a conviction under §860."

U.S. v. McQuilkin, 78 F.3d 105, 108–09 (3d Cir. 1996).

See *Outline* generally at V.F for all cases above.

Criminal History

Career Offender Provision

Seventh and Tenth Circuits hold that amendment to definition of "Offense Statutory Maximum" conflicts with statute; Ninth Circuit upholds amendment. The Tenth Circuit defendant was sentenced in 1989 as a career offender to 262 months. The maximum sentence he could have received under 21 U.S.C. §841(b)(1)(C) was 30 years because he had a prior felony drug conviction; without that enhancement the maximum was 20 years. For defendant's Offense Statutory Maximum under §4B1.1, the court used the 30-year maximum sentence. Effective Nov. 1, 1994, Amendment 506 redefined Offense Statutory Maximum as "not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record," such as the one defendant received under

§841(b)(1)(C). *See* §4B1.1, comment. (n.2). Under the amendment, which was made retroactive, defendant's Offense Statutory Maximum would have been 20 years and his offense level reduced from 34 to 32. He filed a motion to be resentenced under the amendment, but the district court held that Amendment 506 "clearly conflicts" with 28 U.S.C. §994(h) and denied the motion.

The appellate court upheld the district court's conclusion. "We are compelled by the clear directive of §994(h) to hold that Amendment 506 is inconsistent with that statute, and is therefore invalid as beyond the scope of the Commission's authority delegated to it by Congress. . . . The statute directs the Commission to assure that the guidelines specify a sentence 'at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [has been convicted of a crime of violence or enumerated drug offense and has two such prior convictions].' . . . Because the 'maximum term authorized' for categories of defendants in which the defendant has two prior qualifying felony convictions is necessarily the enhanced statutory maximum, we find no ambiguity in the statute. It would make no sense for the statute to require the 'maximum term authorized' to be considered in the context of defendants with two or more prior qualifying felony convictions unless it was intended that that phrase mean the enhanced sentence resulting from such a pattern of recidivism. . . . Under the reading urged by Novey, §994(h) would provide that qualifying recidivist violent felons or drug offenders would only receive sentences at or near the maximum term authorized for defendants without such prior criminal history—that is, the unenhanced maximum. This would negate those provisions in 21 U.S.C. §841(b)(1)(A)–(D) which clearly provide that qualifying recidivist criminals may receive penalties substantially above the maximum penalties authorized for first-time offenders of the same offense. We cannot agree that by expressing an intent to punish repeat drug offenders 'at or near the maximum term authorized,' Congress in fact intended that express statutory sentence enhancements for qualifying recidivist offenders be disregarded."

"In holding that Amendment 506 is invalid, we recognize that we stand in disagreement not only with the Commission, but with the only other appellate court to address the issue. *See U.S. v. LaBonte,* 70 F.3d 1396, 1400 (1st Cir. 1995) ("Although the call is close, we hold that Amendment 506 is a reasonable implementation of the statutory mandate.")" [8 *GSU* #4].

U.S. v. Novey, 78 F.3d 1483, 1487–91 (10th Cir. 1996).

A few days after *Novey* was decided, the Seventh Circuit also invalidated Amendment 506 and held that "Offense Statutory Maximum" includes enhancements. "A pragmatic reading of section 994(h) thus leads us to this conclusion: When Congress directed the Sentencing Commission to provide for sentences 'at or near the maximum term authorized' for persons who qualify as career offenders, it meant the highest penalty for which a given defendant is eligible. For a person who is subject to the enhanced statutory penalties due to her prior convictions and the filing of a section 851(a) notice, that is the enhanced maximum. . . . To treat the unenhanced statutory maximum as the maximum term authorized for purposes of section 994(h), even when the defendant is eligible for a higher penalty, ignores the common meaning of the word 'maximum,' abrogates the enhanced maximums Congress has provided for in statutes like section 841(b), and, we are convinced, underestimates the severity of the penalties Congress had in mind for these defendants."

U.S. v. Hernandez, 79 F.3d 584, 595–601 (7th Cir. 1996).

The defendant in the Ninth Circuit was sentenced under Amendment 506 and the government appealed. The appellate court affirmed and, agreeing with the conclusion of the First Circuit in *LaBonte,* held that Amendment 506 was valid. "Plainly the words 'at or near' create a range in which the Commission is free to act. If Congress intended all sentences to be at the maximum it could have said so. Congress specified that it was for the Commission to determine by the Guidelines whether the term of imprisonment should be at the maximum or near it and to do so in terms of categories of defendants, not in terms of enhancements for particular defendants. . . . The legislative history of [§994(h)] suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. . . . Application Note 2, added to §4B1.1 of the Guidelines, accurately carries out the intention of Congress. It is not for the Department of Justice nor for this court to deny the Commission's carrying out of its statutory function in this way."

U.S. v. Dunn, 80 F.3d 402, 404–05 (9th Cir. 1996) (Rymer, J., dissenting).

See *Outline* at IV.B.3.

Departures

Aggravating Circumstances

First Circuit holds that attempt to hide assets to avoid restitution may warrant departure. Defendant was convicted of interstate theft offenses and received a §3C1.1 enhancement for perjury. The district court also departed upward two levels because "after conviction but before sentence [defendant] created an irrevocable trust for his six year old daughter and transferred to it, without consideration, his real estate and business assets. The trial judge found after a hearing at which [defendant] testified that the purpose of the transfer was to frustrate collection of a likely fine or restitution and that [defendant] himself regarded the trust as 'a sham.'"

The appellate court affirmed. Although defendant argued that the purpose of the trust was simply to provide for his daughter, the evidence showed that he "created the trust shortly after his wife had been ordered to pay over $400,000 in restitution; that [he] had been warned by his lawyer that the trust might be viewed as an attempt to avoid payment of restitution or fines; and that [he] intended to return to operate his business after release and expected to be able to use the real estate as well. . . . [T]he attempt to frustrate a fine or restitution order is a permissible basis for a departure."

The court also concluded that, although an "attempt to frustrate the actual or anticipated judgment by secreting assets is closely akin to obstruction of justice," the fact that defendant had already received an obstruction enhancement did not make departure for additional obstructive conduct double counting. "Here, [defendant]'s attempt to frustrate restitution was not just additional perjury but a new and different act of misbehavior with a different victim; and the sum of the two is greater than either standing alone. Even if both are treated as forms of obstruction and are within section 3C1.1—a matter we need not decide—section 5K2.0 permits departure for an aggravating circumstance 'of a kind, *or to a degree*, not adequately' considered by the guidelines."

U.S. v. Black, 78 F.3d 1, 5–6 (1st Cir. 1996).

See *Outline* at VI.B.1.h.

Mitigating Circumstances

First Circuit holds that "lesser harms" provision, §5K2.11, may allow departure despite §5H1.4's prohibition on considering drug dependence or abuse. Defendant, a 50-year-old farmer, was sentenced to 70 months for manufacturing marijuana. The evidence showed that defendant had suffered from severe depression for 30 years, that the depression made him suicidal, that medication was either ineffective or made him ill, and that, on a doctor's advice, he tried marijuana and found that it helped his depression and kept him from feeling suicidal. When defendant was released from custody pending sentencing on the condition that he not use marijuana, he became depressed and suicidal. He was admitted to a medical center for treatment and therapy and was given medication that worked. He testified at sentencing that "the only reason I used marijuana was to keep from being suicidal, and that now that I have found a proper medication that really works . . . I don't believe that I would ever be tempted . . . in breaking the law to treat my depression." The district court found that defendant's story was credible and wanted to depart under §5K2.11, but concluded it could not because of §5H1.4's prohibition of departures for "[d]rug or alcohol dependence or abuse."

The appellate court disagreed and remanded. "We hold that a district court has authority to consider a downward departure under section 5K2.11, *provided there is an appropriate factual predicate*, even if that predicate subsumes particular facts that would be precluded by section 5H1.4 from forming a basis for departure. . . . Section 5K2.11 provides that '[w]here the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted.' U.S.S.G. §5K2.11, p.s. Here, where the record clearly demonstrates that the alternative to Carvell's marijuana use might well have been the taking of his own life, the interest in punishment or deterrence of drug 'manufacturing' could reasonably be thought to be reduced. In contrast, in the ordinary drug dependence case, it is difficult to see how that limitation in section 5K2.11 could be avoided. . . . This is not a case where the defendant's drug dependence is the very element driving the applicability of the 'lesser harms' provision. The risk of suicide for Carvell was not a byproduct of his drug dependence: the district court credited Carvell's testimony that fear he would take his own life led him to use drugs, not vice versa. The avoidance of suicide, not drug use, drives the 'lesser harms' analysis here."

U.S. v. Carvell, 74 F.3d 8, 9–12 (1st Cir. 1996).

See *Outline* at VI.C.2.a and 5.d.

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Appellate Review

Departures

Supreme Court holds that decision to depart should be reviewed for abuse of discretion, not de novo; Court also states that courts cannot categorically reject a factor as basis for departure. In sentencing two police officers for civil rights violations in the Rodney King beating case, the district court departed downward eight offense levels. The court departed five levels under §5K2.10, concluding that "the victim's wrongful conduct contributed significantly to provoking the offense behavior." It also departed three levels for a combination of circumstances that, individually, would not warrant departure: Defendants were "particularly likely to be targets of abuse" in prison; defendants would suffer administrative sanctions and loss of employment; defendants had been "significantly burden[ed]" by successive state and federal prosecutions; and defendants were not "violent, dangerous, or likely to engage in future criminal conduct," so there was "no reason to impose a sentence that reflects a need to protect the public."

Reviewing the departure de novo, the Ninth Circuit reversed. The court held that the victim misconduct departure was invalid because misbehavior by a suspect in an excessive use of force case is taken into account in the statutes and Guidelines. The court rejected the other four factors as being accounted for in the Guidelines or inappropriate to consider at all. *See U.S. v. Koon,* 34 F.3d 1416, 1452–60 (9th Cir. 1994) [7 *GSU* #2].

The Supreme Court "granted certiorari to determine the standard of review governing appeals from a district court's decision to depart from the sentencing ranges in the Guidelines. The appellate court should not review the departure decision de novo, but instead should ask whether the sentencing court abused its discretion." The Court concluded that the Sentencing Reform Act and the Guidelines reduced but "did not eliminate all of the district court's discretion," and it adopted then-Chief Judge Breyer's opinion that "a sentencing court considering a departure should ask the following questions: '1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case? 2) Has the Commission forbidden departures based on those features? 3) If not, has the Commission encouraged departures based on those features? 4) If not, has the Commission discouraged departures based on those features?' *U.S. v. Rivera,* 994 F.2d 942, 949 (C.A.1 1993)."

"We agree with this summary. If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. . . . If a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' *id.*, at 949, decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'"

As for the standard of review on appeal, the Court agreed that the creation of sentencing guidelines showed "that Congress was concerned about sentencing disparities, but we are just as convinced that Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions."

"A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court. . . . Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. . . . [A] district court's departure decision involves 'the consideration of unique factors that are "little susceptible . . . of useful generalization,"' . . . and as a consequence, de novo review is 'unlikely to establish clear guidelines for lower courts.'"

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To the government's argument that whether a particular factor is within the "heartland" is a question of law, the Court answered that the relevant inquiry is "whether the particular factor is within the heartland given all the facts of the case. For example, it does not advance the analysis much to determine that a victim's misconduct might justify a departure in some aggravated assault cases. What the district court must determine is whether the misconduct which occurred in the particular instance suffices to make the case atypical. The answer is apt to vary depending on, for instance, the severity of the misconduct, its timing, and the disruption it causes. These considerations are factual matters."

"This does not mean that district courts do not confront questions of law in deciding whether to depart. In the present case, for example, the Government argues that the District Court relied on factors that may not be considered in any case. The Government is quite correct that whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point. Little turns, however, on whether we label review of this particular question abuse of discretion or de novo, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction."

As to the specific grounds for departure in this case, the Supreme Court held that the victim's conduct and two of the four "combination" factors were valid reasons for departure. On the first, "[t]he Court of Appeals misinterpreted the heartland of §2H1.4 by concentrating on whether King's misconduct made this an unusual case of excessive force. . . . [T]he same Guideline range applies both to a Government official who assaults a citizen without provocation as well as instances like this where what begins as legitimate force becomes excessive. The District Court did not abuse its discretion in differentiating between the classes of cases, nor did it do so in concluding that unprovoked assaults constitute the relevant heartland. Victim misconduct is an encouraged ground for departure. A district court, without question, would have had discretion to conclude that victim misconduct could take an aggravated assault case outside the heartland."

On the other factors, the government argued that "each of the factors relied upon by the District Court [are] impermissible departure factors under all circumstances." The Court responded that "[t]hose arguments, however persuasive as a matter of sentencing policy, should be directed to the Commission. Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance. Rather, 18 U.S.C. §3553(b) instructs a court that, in determining whether there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately considered by the Commission, it should consider 'only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.' The Guidelines, however, 'place essentially no limit on the number of potential factors that may warrant departure.' . . . The Commission set forth factors courts may not consider under any circumstances but made clear that with those exceptions, it 'does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.' . . . Thus, for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policymaking authority vested in the Commission. . . . We conclude, then, that a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no—as it will be most of the time—the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline."

The Court then concluded that two of the factors could not be used for departure in this case. "[T]he District Court abused its discretion by considering petitioners' career loss because the factor, as it exists in these circumstances, cannot take the case out of the heartland of 1992 USSG §2H1.4. . . . Although cognizant of the deference owed to the district court, we must conclude it is not unusual for a public official who is convicted of using his governmental authority to violate a person's rights to lose his or her job and to be barred from future work in that field." (Note: Justice Stevens dissented on this point.) The Court also found that "the low likelihood of petitioners' recidivism was not an appropriate basis for departure. Petitioners were first-time offenders and so were classified in Criminal History Category I, . . . [which] 'is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.'"

"The two remaining factors are susceptibility to abuse in prison and successive prosecutions. The District Court did not abuse its discretion in considering these factors. The Court of Appeals did not dispute, and neither do we, the District Court's finding that '[t]he extraordinary notoriety and national media coverage of this case, coupled with the defendants' status as police officers, make Koon and Powell unusually susceptible to prison abuse' . . . . The District Court's conclusion that this factor made the case unusual is just the sort of determination that must be accorded deference by the appellate courts."

"As for petitioners' successive prosecutions, it is true that consideration of this factor could be incongruous with the dual responsibilities of citizenship in our federal

system in some instances. Successive state and federal prosecutions do not violate the Double Jeopardy Clause. . . . Nonetheless, the District Court did not abuse its discretion in determining that a 'federal conviction following a state acquittal based on the same underlying conduct . . . significantly burden[ed] the defendants.' . . . The state trial was lengthy, and the toll it took is not beyond the cognizance of the District Court." (Justices Souter, Ginsburg, and Breyer dissented on these last two points.)

The Court remanded for the district court to reconsider the extent of departure in light of this opinion. The Court then added: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the U.S. District Judge. Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of appellate review we adopt."

Koon v. U.S., No. 94-1664 (U.S. June 13, 1996) (Kennedy, J.).

See *Outline* at VI.C.3 and 4.b, X.A.1

Departures

Substantial Assistance

Supreme Court holds that separate motion under 18 U.S.C. §3553(e) is required for substantial assistance departure below mandatory minimum. Defendant was charged with cocaine offenses and faced a ten-year mandatory minimum sentence. He pled guilty under a plea agreement that stated the government would move under §5K1.1 for a departure from the applicable guideline range if he cooperated, but there was no agreement to move under 18 U.S.C. §3553(e) for departure below the mandatory minimum. The government did make a motion "pursuant to §5K1.1" for departure from the guideline sentence, which was 135–168 months, but did not mention §3553(e) or the mandatory minimum. The district court granted the motion and imposed a ten-year term after ruling that, in the absence of a §3553(e) motion, it could not depart below the mandatory minimum.

Defendant appealed, but the Third Circuit affirmed, holding that "a motion under USSG §5K1.1 unaccompanied by a motion under 18 U.S.C. §3553(e) does not authorize a sentencing court to impose a sentence lower than a statutory minimum." *U.S. v. Melendez,* 55 F.3d 130, 135–36 (3d Cir. 1995) [7 *GSU* #10]. The Eighth Circuit agrees, but four circuits have held that a separate §3553(e) motion is not required. See cases in *Outline* at VI.F.3.

The Supreme Court granted certiorari to resolve the circuit split and concluded that a §5K1.1 motion "does not authorize a departure below a lower statutory minimum." The Court rejected petitioner's argument that §5K1.1 creates "a 'unitary' motion system," agreeing with the government that "nothing in §3553(e) suggests that a district court has power to impose a sentence below the statutory minimum to reflect a defendant's cooperation when the Government has not authorized such a sentence, but has instead moved for a departure only from the applicable Guidelines range. Nor does anything in §3553(e) or [28 U.S.C.] §994(n) suggest that the Commission itself may dispense with §3553(e)'s motion requirement, or alternatively, 'deem' a motion requesting or authorizing different action—such as a departure below the Guidelines minimum—to be a motion authorizing the district court to depart below the statutory minimum."

"Moreover, we do not read §5K1.1 as attempting to exercise this nonexistent authority. Section 5K1.1 says: 'Upon motion of the government stating that the defendant has provided substantial assistance . . . the court may depart from the Guidelines,' while its Application Note 1 says: 'Under circumstances set forth in 18 U.S.C. §3553(e) and 28 U.S.C. §994(n) . . . substantial assistance . . . may justify a sentence below a statutorily required minimum sentence,' §5K1.1, comment., n.1. One of the circumstances set forth in §3553(e) is, as we have explained previously, that the Government has authorized the court to impose a sentence below the statutory minimum."

The Court also found unpersuasive petitioner's arguments "that §3553(e) requires a sentence below the statutory minimum to be imposed in 'accordance' with the Guidelines," that §994(n) required the Commission to draft a provision covering reduction below a mandatory minimum for substantial assistance, and that the language of the policy statement and various application notes indicate that §5K1.1 authorizes departure from the mandatory minimum. "We agree with the Government that the relevant parts of the statutes merely charge the Commission with constraining the district court's discretion in choosing a specific sentence after the Government moves for a departure below the statutory minimum. Congress did not charge the Commission with 'implementing' §3553(e)'s Government motion requirement, beyond adopting provisions constraining the district court's discretion regarding the particular sentence selected.

"Although the various relevant Guidelines provisions invoked by the parties could certainly be clearer, we also believe that the Government's interpretation of the current provisions is the better one. Section 5K1.1(a) may guide the district court when it selects a sentence below the statutory minimum, as well when it selects a sentence below the Guidelines range. The Commission has not, however, improperly attempted to dispense with or modify the requirement for a departure below the statutory minimum spelled out in §3553(e)—that of a Government motion requesting or authorizing a departure below the statutory minimum."

The Court left one issue unresolved. "Although the Government contends correctly that the Commission does not have authority to 'deem' a Government motion that does not authorize a departure below the statutory minimum to be one that does authorize such a departure, the Government apparently reads §994(n) to permit the Commission to construct a unitary motion system by adjusting the requirements for a departure below the Guidelines minimum—that is, by providing that the district court may depart below the Guidelines range only when the Government is willing to authorize the court to depart below the statutory minimum, if the court finds that to be appropriate. . . . We need not decide whether the Commission could create this second type of unitary motion system, for two reasons. First, even if the Commission had done so, that would not help petitioner, since the Government has not authorized a departure below the statutory minimum here. Second, we agree with the Government that the Commission has not adopted this type of unitary motion system." (Note: Justices Breyer and O'Connor dissented on this issue.)

Melendez v. U.S., No. 95-5661 (U.S. June 17, 1996) (Thomas, J.).

See *Outline* at VI.F.3.

Determining the Sentence

Fines

Fourth Circuit holds that district courts may not delegate final decisions concerning amount of fine and schedule of payments. Defendant was ordered to pay a $3,000 fine and $50 in restitution. Payments toward those amounts were to be made at such times and in such amounts as the Bureau of Prisons and/or the Probation Office may direct. In another case after this sentencing, the Fourth Circuit held that district courts could not delegate to probation officers final decisions about the amount and schedule of restitution payments. *See U.S. v. Johnson,* 48 F.3d 806, 808–09 (4th Cir. 1995) [7 *GSU* #8].

The appellate court in this case concluded that the reasoning of *Johnson* "equally applies when the delegation involves a fine. Title 18 U.S.C.A. §3572(d) (West Supp.1995) provides that a 'person sentenced to pay a fine or other monetary penalty shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments.' This section as well as §3663(f)(1), setting forth the district court's statutory duty to fix the terms of restitution, both impose upon the 'court' the responsibility for determining installment payments. Like restitution, the statutory duty imposed upon district courts to fix the terms of a fine must be read as exclusive because the imposition of a sentence, including the terms of probation or supervised release, is a core judicial function. Accordingly, we hold a district court may not delegate its authority to set the amount and timing of fine payments to the Bureau of Prisons or the probation officer. *See U.S. v. Kassar,* 47 F.3d 562, 568 (2d Cir. 1995) (holding that a district court may not delegate its responsibility under 18 U.S.C.A. §3572 for determining installment payments with regard to a fine)."

U.S. v. Miller, 77 F.3d 71, 77–78 (4th Cir. 1996). Note: 18 U.S.C. §3572(d) was amended by the Antiterrorism and Effective Death Penalty Act of 1996 (effective Apr. 24, 1996), and new subsection (2) states: "If the judgment, or, in the case of a restitution order, the order, permits other than immediate payment, the length of time over which scheduled payments will be made shall be set by the court, but shall be the shortest time in which full payment can reasonably be made."

See *Outline* at V.D.1, generally at V.E.1.

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Departures

Substantial Assistance

Fourth Circuit holds that departure may be warranted where district court prohibited defendant from actively cooperating with the government in order to obtain substantial assistance departure. Defendant was arrested for possession of child pornography materials. He soon entered a plea agreement that, among other things, called for him to cooperate with an investigation of criminal activity by others in exchange for a downward departure for substantial assistance under USSG §5K1.1. However, after defendant entered his plea, as a condition of release "the district court ordered Goossens to cease his active cooperation in investigative operations. The result of this prohibition was that Goossens was unable to assist the Government personally or to participate in an operation planned by the United States Customs Service. The parties subsequently requested that the district court allow Goossens to resume his active cooperation with law enforcement officials." The district court refused to lift the ban, and the government subsequently did not file a §5K1.1 motion. Defendant requested a downward departure on the ground that the Sentencing Commission did not consider a situation where a district court order prevented a defendant from assisting the government to qualify for a §5K1.1 departure. The district court denied that request, but sua sponte departed downward under §5K2.13 for diminished capacity. The government appealed that departure.

The appellate court remanded. First, it held that the facts did not support a finding that defendant suffered from diminished mental capacity such as would justify departure under §5K2.13. Because the sentence would have to be reconsidered on remand, the court "address[ed] the prohibition on Goossens' active cooperation with law enforcement authorities and the appropriateness of departing downward from the properly calculated guideline range on the basis of this prohibition."

"The district court committed a clear abuse of discretion by imposing the prohibition on cooperation with law enforcement officials as a condition of Goossens' release. Although we have difficulty imagining factual circumstances in which the imposition of such a condition might be appropriate, we do not foreclose the possibility that such a condition might in some extraordinary circumstances properly be imposed by a district court when truly necessary to assure a defendant's appearance or to protect the public safety. There is no genuine argument, however, that the condition was necessary in this instance. Indeed, the district court did not even attempt to justify its imposition on this basis. Instead, the court based its decision on its view of what would best benefit the rehabilitation of the defendant, a factor that is conspicuously absent among those specified in [18 U.S.C.] §3142(c)(1)(B)," the provision that prescribes conditions of release that may be imposed on a convicted defendant.

"Furthermore, in so doing, the district court improperly frustrated Goossens' desire to cooperate in order to qualify for more favorable sentencing treatment and the Government's legitimate hope that he would aid in law enforcement authorities' investigative efforts. *See U.S. v. Vargas,* 925 F.2d 1260, 1265 (10th Cir. 1991) (holding that 'inflexible practice' by district court of refusing to permit criminal defendants to cooperate was error); *U.S. v. French,* 900 F.2d 1300, 1302 (8th Cir. 1990) (same)."

The court concluded that "the Sentencing Commission did not consider the possibility that a district court might affirmatively prohibit a defendant from cooperating with law enforcement authorities in an effort to qualify for a departure based upon substantial assistance. And, it is undisputed that Goossens was so prohibited by the district court in this instance. Accordingly, we conclude that on remand the district court should determine whether, under the circumstances of this case, this factor is sufficiently important such that a sentence outside the guideline range should result. In weighing whether the facts presented by situations such as this warrant a sentence outside the guideline range, a court should consider whether a defendant's cooperation likely would have been such that the Government would have moved for a departure based upon substantial assistance had the defendant's cooperation not been foreclosed improperly."

U.S. v. Goossens, 84 F.3d 697, 699–704 (4th Cir. 1996).

See *Outline* generally at VI.F.1.a.

Mitigating Circumstances

First Circuit holds that "aberrant behavior" is determined by viewing the totality of the circumstances. Defendant pled guilty to one count of mail fraud. He requested departure based on "aberrant behavior," and the government agreed. The district court, however, ruled that it could not depart on this basis because defendant's conduct did not fall within the court's definition of aberrant behavior, which included "spontaneity or thoughtlessness in committing the crime of conviction."

The appellate court remanded. Rejecting the approach of some circuits that require "a spontaneous and seemingly thoughtless act," the court opted for the broader view of aberrant behavior taken by the Ninth and Tenth Circuits. It held that "determinations about whether an offense constitutes a single act of aberrant behavior should be made by reviewing the totality of the circumstances. District court judges may consider, inter alia, factors such as pecuniary gain to the defendant, charitable activities, prior good deeds, and efforts to mitigate the effects of the crime in deciding whether a defendant's conduct is aberrant in terms of other crimes. . . . Spontaneity and thoughtlessness may also be among the factors considered, though they are not prerequisites for departure."

"That aberrant behavior departures are available to first offenders whose course of criminal conduct involves more than one criminal act is implicit in our holding. . . . We think the Commission intended the word 'single' to refer to the crime committed and not to the various acts involved. As a result, we read the Guidelines' reference to 'single acts of aberrant behavior' to include multiple acts leading up to the commission of a crime. . . . Any other reading would produce an absurd result. District courts would be reduced to counting the number of acts involved in the commission of a crime to determine whether departure is warranted. Moreover, the practical effect of such an interpretation would be to make aberrant behavior departures virtually unavailable to most defendants because almost every crime involves a series of criminal acts."

The court added that, "[w]ithout more, first-offender status is not enough to warrant downward departure. District courts are not, however, precluded from considering first-offender status as a factor in the departure calculus. Departure-phase consideration of a defendant's criminal record does not, we think, wrongly duplicate the calculations involved in establishing a defendant's criminal history category under the Guidelines. . . . The Guidelines explain that 'the court may depart . . . even though the reason for departure is taken into consideration . . . if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.' U.S.S.G. §5K2.0."

U.S. v. Grandmaison, 77 F.3d 555, 562–64 (1st Cir. 1996). *But see U.S. v. Withrow,* 85 F.3d 527, 531 (11th Cir. 1996) (aberrant behavior "is not established unless the defendant is a first-time offender and the crime was a spontaneous and thoughtless act rather than one which was the result of substantial planning"); *U.S. v. Dyce,* 78 F.3d 610, 619 (D.C. Cir. 1996) (following circuits that require "a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning"), *as amended on denial of rehearing,* 91 F.3d 1462, 1470 (D.C. Cir. 1996).

See *Outline* at VI.C.5.c.

Seventh Circuit holds that "sentencing manipulation" is not a valid defense. Over a three-week period defendant made four separate sales of heroin to an undercover agent, the last one being the largest at one kilogram. Defendant claimed on appeal that the government manipulated his sentence by waiting to arrest him so that the additional heroin sold would increase his sentence.

The appellate court rejected this claim. "Sentencing manipulation occurs when the government engages in improper conduct that has the effect of increasing a defendant's sentence. . . . This claim is distinct from a claim of sentencing entrapment which occurs when the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense" (a claim defendant did not make). "We now hold that there is no defense of sentencing manipulation in this circuit. A suspect has no constitutional right to be arrested when the police have probable cause. . . . It is within the discretion of the police to decide whether delaying the arrest of the suspect will help ensnare co-conspirators, as exemplified by this case, will give the police greater understanding of the nature of the criminal enterprise, or merely will allow the suspect enough 'rope to hang himself.' Because the Constitution requires the government to prove a suspect is guilty of a crime beyond a reasonable doubt, the government 'must be permitted to exercise its own judgment in determining at what point in an investigation enough evidence has been obtained.'"

U.S. v. Garcia, 79 F.3d 74, 75–76 (7th Cir. 1996).

See *Outline* at VI.C.4.c.

Tenth Circuit holds that claim of sentencing entrapment or manipulation will be reviewed under outrageous conduct standard. Defendant was suspected of cocaine distribution. After the government made three half-kilogram purchases from a coconspirator by an undercover operative, they arranged a larger purchase that resulted in the seizure of five kilograms of cocaine that defendant and another were transporting, plus five more kilograms from a farm where government agents had suspected defendant stored drugs. Defendant was sentenced on the basis of all 11.5 kilograms of cocaine but argued that the last ten kilograms should have been excluded because the government engaged in "sentence factor manipulation" by continuing its investigation and negotiating the multikilogram purchase after it had sufficient evidence against defendant and his coconspirators.

The appellate court disagreed and affirmed the sentence. "This Circuit never has addressed squarely a defense claim of 'sentencing factor manipulation' under that rubric. However, we have addressed the same concept under the appellation of 'outrageous governmental conduct' . . . [and] suggested that sufficiently egregious government conduct may affect the sentencing determination. . . . [W]e believe that arguments such as Lacey's,

whether presented as 'sentencing factor manipulation' or otherwise, should be analyzed under our established outrageous conduct standard. . . . [T]he relevant inquiry is whether, considering the totality of the circumstances in any given case, the government's conduct is so shocking, outrageous and intolerable that it offends 'the universal sense of justice.'" Looking at the circumstances of the case, the court concluded that the multikilogram transaction "was in furtherance of legitimate law enforcement objectives and not, as a matter of law, outrageous."

U.S. v. Lacey, 86 F.3d 956, 963–66 (10th Cir. 1996).

See *Outline* at VI.C.4.c.

Determining the Sentence

"Safety Valve" Provision

First Circuit holds that submitting to debriefing by government is advisable, but not required, under safety valve provision. Defendant requested application of 18 U.S.C. §3553(f) on the basis of "an eight-page letter setting forth what purported to be Montanez' 'information' concerning the crimes charged in the case" that his attorney sent to the government. However, the letter "was drawn almost verbatim from an affidavit filed by one of the federal agents early in the case." In finding that defendant had not satisfied §3553(f)(5)'s requirement to "truthfully provide to the Government all information" about the offense, the district court indicated that defendants must submit to debriefing by the government to qualify for the safety valve provision. On appeal, defendant argued that there is no debriefing requirement and that the letter complied with the statute. The government argued that debriefing is required but, alternatively, that defendant had not made the required disclosures anyway.

"[T]he issue before us is whether the statute requires the defendant to offer himself for debriefing as an automatic pre-condition in every case, and it is hard to locate such a requirement in the statute. All that Congress said is that the defendant be found by the time of the sentencing to have 'truthfully provided to the Government' all the information and evidence that he has. Nothing in the statute, nor in any legislative history drawn to our attention, specifies the form or place or manner of the disclosure." Although debriefing is not required, "[a]s a practical matter, a defendant who declines to offer himself for a debriefing takes a very dangerous course. It is up to the defendant to persuade the district court that he has 'truthfully provided' the required information and evidence to the government. . . . And a defendant who contents himself with a letter runs an obvious and profound risk: The government is perfectly free to point out the suspicious omissions at sentencing, and the district court is entitled to make a common sense judgment, just as the district judge did in this case. . . . The possibility remains, however rare, that a defendant could make a disclosure without a debriefing (*e.g.,* by letter to the prosecutor) so truthful and so complete that no prosecutor could fairly suggest any gap or omission." This was not such a case, however, and the court concluded that "[t]he failure to disclose is so patent in this case that no reason exists for extended discussion."

U.S. v. Montanez, 82 F.3d 520, 522–23 (1st Cir. 1996). *See also U.S. v. Jimenez Martinez,* 83 F.3d 488, 495–96 (1st Cir. 1996) (agreeing with *U.S. v. Rodriguez,* 60 F.3d 193 (5th Cir. 1995) [8 *GSU* #1], that statements to probation officer do not satisfy requirement of §3553(f)(5) to provide information "to the Government").

See *Outline* at V.F and cases in 8 *GSU #*'s 1,5, and 6.

Criminal History

Career Offender Provision

Eighth Circuit holds that amended definition of "Offense Statutory Maximum" conflicts with statute. Effective Nov. 1, 1994, Amendment 506 states that "Offense Statutory Maximum," used to determine a career offender's offense level, "refers to the maximum term of imprisonment authorized for the offense of conviction . . . not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." *See* USSG §4B1.1, comment. (n.2). Defendant was subject to such an enhancement, but the district court followed the amendment and used the unenhanced statutory maximum. The government appealed, claiming that the Sentencing Commission exceeded its authority in enacting the amendment.

The appellate court agreed and remanded. "Based upon the plain language of [28 U.S.C. §]994(h), we conclude that the amendment conflicts with the statute and is therefore invalid. . . . Section 994(h) requires that '[t]he Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older' and has been convicted of a crime of violence or enumerated drug offense and has at least two prior such convictions. . . . The controverted language is the phrase 'at or near the maximum term authorized.' The question becomes the maximum term of what—the enhanced sentence or the unenhanced sentence? . . . In our view, the statute is a recidivist statute clearly aimed at the category of adult repeat violent felons and adult repeat drug felons. . . . Because the 'maximum term authorized' for categories of recidivist defendants is necessarily the enhanced statutory maximum, there is no ambiguity in the statute."

U.S. v. Fountain, 83 F.3d 946, 950–53 (8th Cir. 1996). *Accord U.S. v. Hernandez,* 79 F.3d 584, 595–601 (7th Cir. 1996) [8 *GSU* #6]; *U.S. v. Novey,* 78 F.3d 1483, 1487–91 (10th Cir. 1996) [8 *GSU* #6]. *Contra U.S. v. Dunn,* 80 F.3d 402, 404–

05 (9th Cir. 1996) [8 *GSU* #6]; *U.S. v. LaBonte,* 70 F.3d 1396, 1403–12 (1st Cir. 1995) [8 *GSU* #4], *cert. granted,* 116 S. Ct. 2545 (U.S. June 24, 1996).

See *Outline* at IV.B.3.

Sentencing Procedure

Fed. R. Crim. P. 35(a) and (c)

Second Circuit holds that complete failure to consider supervised release revocation policy statement was "clear error" allowing correction of sentence under Rule 35(c). Before defendant's supervised release was revoked, he was held for eight months in pretrial detention on a related state charge. The district court sentenced him to six months in prison without considering USSG §7B1.3(e), which states that a revocation sentence should be increased "by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18 U.S.C. §3585(b)." Within seven days after sentencing, the court was informed that the Bureau of Prisons intended to credit defendant for the eight months in state custody, which would lead to his immediate release, and that the court had overlooked §7B1.3(e). On the seventh day the court held another sentencing hearing and resentenced defendant to fourteen months. The court reasoned that its failure to consider §7B1.3(e) was error and that it had the authority under Fed. R. Crim. P. 35(c) to "correct a sentence that was imposed as a result of arithmetical, technical, or other clear error."

The appellate court affirmed the resentencing. "A district court's concededly narrow authority to correct a sentence imposed as a result of 'clear error' is limited to 'cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a),' . . . which authorizes the correction of a sentence on remand when the original sentence results from 'an incorrect application of the sentencing guidelines.'" Although the policy statements on revocation of release are advisory rather than mandatory, "district courts are required to consider them when sentencing a defendant for a violation of probation or supervised release. . . . Because courts are required to consider the policy statements in Chapter 7 of the Guidelines, we find that the district court's failure to do so here constituted an 'incorrect application of the sentencing guidelines' within the meaning of Rule 35(a). Accordingly, it properly exercised its authority to correct its error within seven days after the imposition of the original sentence, pursuant to Rule 35(c)."

The court distinguished *U.S. v. Abreu-Cabrera,* 64 F.3d 67 (2d Cir. 1995) [8 *GSU* #2], where it reversed a district court attempt to use Rule 35(c) to give defendant a downward departure on resentencing. In that case, "the court's resentencing 'represented nothing more than a district court's change of heart as to the appropriateness of the sentence,'" which is not authorized by the rule.

U.S. v. Waters, 84 F.3d 86, 89–90 (2d Cir. 1996).

See *Outline* at IX.F.

Certiorari Granted:

U.S. v. LaBonte, 70 F.3d 1396 (1st Cir. 1995) [8 *GSU* #4], *cert. granted,* 116 S. Ct. 2545 (U.S. June 24, 1996). Question presented: "Does Sentencing Commission's implementation of Career Offender Guideline [Offense Statutory Maximum] conflict with commission's obligation under Section 994(h) to 'assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of' career offenders?"

See *Outline* at IV.B.3 and summary of *Fountain* above.

Note to readers

The next revision of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* will be completed in November for distribution in December.

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Violation of Supervised Release

Revocation

Third and Seventh Circuits disagree on whether supervised release may be reimposed after revocation when original offense occurred before law changed. Before enactment of the 1994 Crime Bill on Sept. 13, 1994, 18 U.S.C. §3583 did not specifically allow reimposition of a term of supervised release after revocation and imprisonment. Most circuits, including the Third and Seventh, held that release could not be reimposed. The 1994 Crime Bill added new §3583(h), which authorized reimposition of supervised release to follow imprisonment after revocation. Defendants here committed their offenses and were sentenced before Sept. 13, 1994. In 1995 both violated the terms of their supervised release, had release revoked, were sent to prison, and were given a new term of supervised release to follow incarceration.

The Seventh Circuit held that application of §3583(h) to defendant violated the Ex Post Facto Clause of the Constitution because it could result in greater punishment than the old law. "Assume that Defendant A is convicted of a Class C felony and sentenced to a term of imprisonment followed by three years of supervised release. . . . He serves his prison time and is released under supervision. One year into his supervised release period, he violates the terms of the release. Prior to Subsection (h), because an additional term of supervised release was not permitted, the maximum penalty the court could impose was two years' imprisonment. 18 U.S.C. §3583(b)(3). At the end of two years the government's supervision of A is extinguished. After Subsection (h), the district court, perhaps believing itself more lenient, may order A to serve two years on a combination of imprisonment and supervised release, say one year in prison and one year on supervised release. If A then violates the terms of that second supervised release six months into it, the court has the power to send him back to prison again, this time for up to one year (the two-year maximum minus the one-year term of imprisonment he has already served). Under this scenario, A's punishment totals two and a half years from the time of his initial revocation (one year in prison, six months on supervised release, and then another year in prison)—six months longer than that allowed prior to Subsection (h). And the potential exists for even greater discrepancies."

The court also had to determine if application of §3583(h) to defendant would be retroactive, a question the court framed as "whether the punishment imposed upon Beals' revocation 'should be considered the continuing "legal consequence" of [Beals'] original crimes, or viewed instead as the independent "legal consequence" of [Beals' later] misconduct.'" Following cases that held that changes treating parole violations more severely may not be applied retroactively, the court concluded that punishment under §3583(h) would arise from defendant's original offense. "Conduct that violates the terms of supervised release, like that of parole violations, is often not criminal. . . . Therefore, the government punishes that conduct only because of the defendant's original offense. For that reason, we must link the punishment imposed for the subsequent conduct to the original offense for ex post facto purposes. . . . Any law enacted after the original offense that increases the total amount of time he can spend in [imprisonment and post-imprisonment release] violates the Ex Post Facto Clause." The court "remanded [the case] to the district court for it to amend its revocation order by eliminating the requirement that Beals serve a second term of supervised release following his term of imprisonment."

U.S. v. Beals, 87 F.3d 854, 858–60 (7th Cir. 1996).

In the Third Circuit, the appellate court affirmed, holding that applying the new law was not an ex post facto violation because it did not impose greater punishment than the old law. "Before the enactment of subsection (h), a defendant who violated supervised release could be sentenced to imprisonment under 18 U.S.C. §3583(e)(3) for up to the maximum term of supervised release for a given offense, without any credit for the time spent on supervised release." Defendant had committed a Class A felony and faced a maximum of five years in prison if he violated his supervised release. "Under the new subsection (h), . . . the new term of supervised release may not exceed the maximum term of supervised release authorized for the offense, minus the term of imprisonment imposed upon revocation of the original term of supervised release. Thus, under the new law, Brady could have been sentenced to a combination of imprisonment and supervised release that was no greater than five years. Accordingly, the maximum period of time that a defendant's freedom can be restrained is the same."

"The only difference is that now Brady's liberty can be restrained with a mix of imprisonment and supervised release. In either event, the legal consequences of his criminal conduct are identical, i.e., he faces the possibility

of a 5-year term of loss of freedom both before the enactment of subsection (h) and after the enactment of subsection (h). Therefore, the availability of supervised release in no way increased the amount of time that Brady was exposed to incarceration. Thus, we fail to see how subsection (h) increased the penalty for his original offense, and we find no ex post facto violation."

U.S. v. Brady, 88 F.3d 225, 228–29 (3d Cir. 1996).

See *Outline* at VII.B.1

Offense Conduct

Calculating Weight of Drugs

En banc Eleventh Circuit holds that previously harvested marijuana plants may be used when sentencing by number of plants with weight-per-plant ratio. Defendant grew marijuana in the basement of a house. When he was arrested there were 27 live plants. Law enforcement officers also found what they later determined to be the remains of 26 previously harvested marijuana plants. The district court concluded that the remains could be counted as "plants" under the "equivalency provision" of USSG §2D1.1, n.* (1993), which considered each plant to equal one kilogram of marijuana (changed in 1995 to 100 grams) for sentencing purposes when the offense involved 50 or more plants.

"The primary issue in this appeal is whether, under 21 U.S.C. §841 and U.S.S.G. §2D1.1, a marijuana grower who is apprehended after his marijuana crop has been harvested should be sentenced according to the number of plants involved in the offense or according to the weight of the marijuana. A panel of this court held that, under our precedents, a grower who is apprehended after harvest may not be sentenced according to the number of plants involved. *U.S. v. Shields,* 49 F.3d 707, 712–13 (11th Cir. 1995). We vacated the panel opinion and granted rehearing en banc. *U.S. v. Shields,* 65 F.3d 900 (11th Cir. 1995). We hold that a defendant who has grown and harvested marijuana plants should be sentenced according to the number of plants involved, and affirm the district court."

"By its own terms, the equivalency provision applies to 'offense[s] involving marijuana plants.' Similarly, the statute sets mandatory minimum sentences for violations of §841(a) 'involving' a specified number of 'marijuana plants.' Nothing in the text of §2D1.1 or §841(b) suggests that their application depends upon whether the marijuana plants are harvested before or after authorities apprehend the grower."

"An interpretation of §2D1.1 that is not supported by the text of the guideline and depends on a state of affairs discovered by law enforcement authorities is contrary to the principle that guideline ranges are based on relevant conduct. *See* U.S.S.G. §1B1.3. The guidelines broadly define 'relevant conduct,' which includes, among other things, '*all* acts and omissions committed . . . by the defendant . . . that occurred during the commission of the offense of conviction.' *Id.* (emphasis added). We hold that, where there is sufficient evidence that the relevant conduct for a defendant involves growing marijuana plants, the equivalency provision of §2D1.1 applies, and the offense level is calculated using the number of plants."

U.S. v. Shields, 87 F.3d 1194, 1195–97 (11th Cir. 1996) (en banc).

See *Outline* at II.B.2

En banc Tenth Circuit holds that full weight of methamphetamine "mixture" is used to calculate statutory minimum sentence. Defendant was originally sentenced to 188 months on the basis of the 32-kilogram weight of the methamphetamine mixture he produced. After §2D1.1, comment. (n.1), was amended in 1993 to exclude unusable materials from a drug "mixture or substance" for sentencing purposes, he was resentenced to 60 months based on the weight of the pure methamphetamine, 28 grams, that remained after excluding waste water. The government appealed, arguing that the amended guideline does not control drug weight for the purpose of calculating the mandatory minimum sentence under 21 U.S.C. §841(b), and that defendant was subject to a ten-year minimum for possessing more than one kilogram of a "mixture or substance containing a detectable amount of methamphetamine." The appellate panel did not agree and affirmed the sentence. *U.S. v. Richards,* 67 F.3d 1531 (10th Cir. 1995) [8 *GSU* #3].

The en banc court reversed, holding that "the plain language of §841(b)" and *Chapman v. U.S.,* 500 U.S. 453 (1991), requires using the weight of the mixture. In *Neal v. U.S.,* 116 S. Ct. 763 (1996) [8 *GSU* #4], "the Court reaffirmed that *Chapman* sets forth the governing definition of 'mixture or substance' for purposes of §841. In *Neal*, the Sentencing Commission amended the guidelines post-*Chapman* to revise the method of calculating the weight of LSD for purposes of sentencing under the guidelines. . . . The Court held that *Chapman*'s plain meaning interpretation of 'mixture or substance' governs the determination of a defendant's statutory mandatory minimum sentence under §841, even where the Sentencing Commission adopts a conflicting definition in the sentencing guidelines."

"Although the Court in *Chapman* specifically interpreted 'mixture or substance' in 21 U.S.C. §841(b)(1)(B)(v), its interpretation is not limited to that subsection. Under settled canons of statutory construction, we presume that identical terms in the same statute have the same meaning. . . . Accordingly, the plain meaning of 'mixture or substance' governs Defendant's mandatory minimum sentence calculation under §841(b)."

"Applying the plain meaning of 'mixture,' the methamphetamine and liquid by-products Defendant possessed constitute 'two substances blended together so

that the particles of one are diffused among the particles of the other.' . . . Liquid by-products containing methamphetamine therefore constitute a 'mixture or substance containing a detectable amount of methamphetamine' for purposes of §841(b)." The court rejected defendant's "invitation to define the statute in accord with the Sentencing Commission's amendment under a 'congruent' approach" or to follow cases which held that only "marketable" portions of a drug mixture should be used.

U.S. v. Richards, 87 F.3d 1152, 1156–57 (10th Cir. 1996) (en banc) (three judges dissented).

See *Outline* at II.B.1

Ninth Circuit holds that amended Note 12 of §2D1.1 should be applied retroactively to set offense level by weight of drugs actually delivered, not larger amount negotiated. Defendants negotiated to sell five kilograms of cocaine to undercover FBI agents but actually delivered somewhat less. They were sentenced for the five kilograms they negotiated. On appeal, defendants argued they should have been sentenced for the amount actually delivered, which would reduce their offense levels by two. While the appeals were pending, Note 12 of §2D1.1 was amended to specify that the offense level should be determined by the amount of drugs negotiated "unless the sale is completed and the actual amount delivered more accurately reflects the scale of the offense." The appellate court concluded that, under amended Note 12, the amount actually delivered here would be used: "[A]s the amount of cocaine actually present and under negotiation is determinable by the court and as no further delivery was contemplated . . . , the amount of cocaine actually seized (4,643 grams) more accurately reflects the scale of the offense than the promised five kilograms."

The court then held that the amendment should apply retroactively and remanded. "Amendments to Guidelines that occur between sentencing and appeal that clarify the Guidelines, rather than substantively change them, are given retroactive application. . . . The prior version of Application Note 12 was silent as to the amount of cocaine to be considered in a completed transaction. . . . In short, until Application Note 12 was amended, the appropriate weight of drugs to consider in a completed transaction was ambiguous; a court might sentence on the amount under negotiation or the amount delivered. Although this court twice addressed the proper interpretation of old version of Application Note 12, we never squarely answered the question of the appropriate weight to consider when sentencing a defendant for a completed transaction. . . . We therefore hold that by specifying the weight to consider in a completed transaction, the current version of Application Note 12 clarifies the Guidelines, and should be given retroactive effect."

U.S. v. Felix, 87 F.3d 1057, 1059–60 (9th Cir. 1996).

See *Outline* at II.B.4.a

Determining the Sentence

"Safety Valve" Provision

Ninth Circuit affirms safety valve reduction for defendant who, at trial and sentencing, denied earlier admissions. Defendant was arrested for importing heroin. In an interview after his arrest, defendant told federal agents what he knew of the importation scheme, including the identity of his supplier, and admitted that he knew he was carrying drugs. At his trial, however, defendant claimed that he had no knowledge of the drugs before their discovery by customs agents and thought he was merely returning a suitcase to a friend of the man he had earlier identified as the supplier. He stuck to that story in a presentence interview and at the sentencing hearing. The district court denied defendant a §3E1.1 reduction for acceptance of responsibility but concluded that, despite his later denials, the information he provided to the government agents in the post-arrest interview qualified him for a safety valve reduction from the mandatory minimum, *see* 18 U.S.C. § 3553(f); USSG § 5C1.2.

The appellate court affirmed, rejecting the government's urging to analogize to § 3E1.1. "[W]e see no reason to require a defendant to meet the requirements for acceptance of responsibility in order to qualify for relief under the safety valve provision. . . . The safety valve statute is not concerned with sparing the government the trouble of preparing for and proceeding with trial, as is §3E1.1, or . . . with providing the government a means to reward a defendant for supplying useful information, as is §5K1.1. Rather, the safety valve was designed to allow the sentencing court to disregard the statutory minimum in sentencing first-time nonviolent drug offenders who played a minor role in the offense and who 'have made a good-faith effort to cooperate with the government.' . . . We hold that the district court did not clearly err in finding that Shrestha met the safety valve requirements. The fact that Shrestha denied his guilty knowledge at trial and at sentencing after his confession to the customs agents does not render him ineligible for the safety valve reduction as a matter of law. The safety valve provision authorizes district courts to grant relief to defendants who provide the Government with complete information by the time of the sentencing hearing. Shrestha's recantation does not diminish the information he earlier provided." *But cf. U.S. v. Long,* 77 F.3d 1060, 1062–63 (8th Cir. 1996) (affirming denial of §3553(f) reduction to defendant who lied to government about material fact in presentence interview and admitted it only on cross-examination during sentencing hearing) [8 *GSU* #6].

The court added that the initial burden of proof "is incontestably on the defendant to demonstrate by a preponderance of the evidence that he is eligible for the reduction. . . . Once he has made this showing, however, it falls to the Government to show that the information he

has supplied is untrue or incomplete. Apart from contending that Shrestha's denial of guilty knowledge at trial rendered him untruthful, which we have deemed irrelevant, the Government did not do so."

U.S. v. Shrestha, 86 F.3d 935, 939–40 (9th Cir. 1996). *See also U.S. v. Ramirez,* 94 F.3d 1095, 1100–01 (7th Cir. 1996) (affirmed: agreeing with other circuits that defendant "had the burden of proving, by a preponderance of the evidence, his entitlement to the reduction under §5C1.2").

See *Outline* generally at V.F and cases in 8 *GSU* #6

Departures

Mitigating Circumstances

Seventh Circuit holds that discovery of offense must objectively be unlikely to warrant §5K2.16 departure for voluntary disclosure. Section 5K2.16 states that if a defendant "voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted." Defendant here, vice president of a bank, voluntarily revealed that he had misapplied bank funds. Because defendant confessed out of remorse, not because he feared discovery, the district court departed from the guideline range of 18–24 months to impose a sentence of nine months. The government appealed, claiming the district court failed to make a necessary finding that discovery of the offense would have been unlikely absent defendant's disclosure.

The appellate court agreed and remanded, rejecting defendant's argument that the district court should make a subjective inquiry into *defendant's* belief as to the likelihood of discovery, rather than an objective inquiry into the actual likelihood of discovery. "[T]he guideline sets forth two requirements for a downward departure: (1) the defendant voluntarily disclosed the existence of, and accepted responsibility for, the offense prior to discovery of the offense; and (2) the offense was unlikely to have been discovered otherwise. . . . [A] downward departure is only awarded where the defendant is motivated by guilt and the Government receives information it likely would not have acquired absent the disclosure. The plain language yields this result, and we thus need not inquire further into the drafters' intent." Remand is required because the district court "did not make particularized findings regarding the likelihood of discovery."

U.S. v. Besler, 86 F.3d 745, 747–48 (7th Cir. 1996). *Cf. U.S. v. Brownstein,* 79 F.3d 121, 122–23 (9th Cir. 1996) (affirmed: "plain language" of §5K2.16 shows that it does not apply to bank robber who voluntarily notified police and confessed—offenses were already known to authorities even if identity of robber was not).

See *Outline* generally at VI.C.5

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